



Montana Legislative History

Checklist of Bill History

Chapter: 348 Session L: 1997

Bill Number: SB 79

History and Final Status Sheet	x
Introduced Bill	X
Fiscal Note	X
Third Reading Bill	X
Final Version of Bill	X

House

Committee:
Judiciary

Hearing Date(s):
March 5, 1997
March 11, 1997
(Executive Action)

Senate

Committee: Judiciary

Hearing Date(s):
Jan. 27, 1997
Jan. 30, 1997 (Exec. Action)

Conference Committee

Hearing Date(s): n/a

Conference Committee Report:

Compiler Notes

Compiled by: sg

Date: 9/20/24

Notes:

WHEREAS, the Board of County Commissioners has jurisdiction and power to purchase or receive by donation any real property for the use of the county; and

WHEREAS, the Board of County Commissioners has jurisdiction and power to lease and demise county property, however acquired, that is not necessary to the conduct of the county's business or the preservation of county property; and

WHEREAS, counties must preserve, take care of, manage, and control these properties.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 7-8-2232, MCA, is amended to read:

"7-8-2232. Distribution of lease revenue. (1) All revenue derived from leases authorized by 7-8-2231, except as otherwise provided, must be paid into the county treasury treasurer and may be deposited in the county general fund. ~~Upon receipt of funds, the county treasurers shall distribute the revenue as collected to the several county and trust and agency funds on the basis of the tax levy for the current year.~~

(2) *The revenue described in subsection (1) may be used for any county purpose, including maintaining or preserving leased property."*

Section 2. Effective date. [This act] is effective July 1, 1997.

Approved March 17, 1997

CHAPTER NO. 79

[SB 131]

AN ACT INCREASING THE NUMBER OF ACRES OF STATE LAND THAT THE BOARD OF LAND COMMISSIONERS MAY SELL OR LEASE TO A SCHOOL DISTRICT FOR USE AS A SCHOOL SITE TO 25 ACRES FOR AN ELEMENTARY SCHOOL AND 50 ACRES FOR A HIGH SCHOOL; AMENDING SECTION 20-6-621, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 20-6-621, MCA, is amended to read:

"20-6-621. Selection of school sites, approval election, and lease of state lands. (1) (a) ~~The~~ Except as provided in subsection (1)(b), the trustees of a district may select the sites for school buildings or for other school purposes, but the selection must first be approved by the qualified electors of the district before a contract for the purchase of a site is entered into by the trustees,

(b) ~~except the~~ The trustees may purchase or otherwise acquire property contiguous to an existing site that is in use for school purposes without a site approval election. The trustees may take an option on a site prior to the site approval election.

(2) The election for the approval of a site must be called under the provisions of 20-20-201 and must be conducted in the manner prescribed by this title for school elections. An elector who may vote at a school site election is qualified to vote under the provisions of 20-20-301. If a majority of those voting at the election approve the site selection, the trustees may purchase the site. A site approval election is not required when the site was specifically identified in an election at which an additional levy or the issuance of bonds was approved for the purchase of the site.

(3) Any site for a school building or other building of the district that is selected or purchased by the trustees must:

- (a) be in a place that is convenient, accessible, and suitable;
- (b) comply with the minimum size and other requirements prescribed by the department of public health and human services; and
- (c) comply with the statewide building regulations, if any, promulgated by the department of commerce.

(4) The board of land commissioners may sell, at the appraised value, or lease for any period of time less than 99 years, at an amount of \$1 per year, to a district any tract of state land of not more than:

(a) ~~10~~ 25 acres to be used as a ~~school~~ site in the district *for an elementary school*; or

(b) 50 acres to be used as a site in the district *for a high school*."

Section 2. Effective date. [This act] is effective on passage and approval.

Approved March 17, 1997

CHAPTER NO. 80

[HB 8]

AN ACT APPROVING RENEWABLE RESOURCE PROJECTS AND AUTHORIZING LOANS; REAUTHORIZING RENEWABLE RESOURCE PROJECTS AUTHORIZED BY THE 54TH LEGISLATURE; APPROPRIATING MONEY TO THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION FOR LOANS UNDER THE RENEWABLE RESOURCE GRANT AND LOAN PROGRAM; AUTHORIZING THE ISSUANCE OF COAL SEVERANCE TAX BONDS; AUTHORIZING THE CREATION OF A STATE DEBT AND APPROPRIATING COAL SEVERANCE TAXES; PLACING CERTAIN CONDITIONS UPON LOANS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Approval of renewable resource projects and authorizations to provide loans. The legislature finds that the renewable resource projects listed in this section meet the provisions of 17-5-702. The department of natural resources and conservation is authorized to make loans to the political subdivisions of state government and local governments listed below

1/20	2ND READING PASSED	49	0
1/21	3RD READING PASSED	49	0
	TRANSMITTED TO HOUSE		
1/23	FIRST READING		
1/23	REFERRED TO LOCAL GOVERNMENT		
2/06	HEARING		
2/07	COMMITTEE REPORT—BILL CONCURRED		
3/04	2ND READING CONCURRED	91	6
3/05	3RD READING CONCURRED	96	4
	RETURNED TO SENATE		
3/07	SIGNED BY PRESIDENT		
3/09	SIGNED BY SPEAKER		
3/10	TRANSMITTED TO GOVERNOR		
3/12	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 46		
	EFFECTIVE DATE: 10/01/97		

SB 78 INTRODUCED BY SPRAGUE *LC0892 DRAFTER: PETESCH*

CREATE GOVERNMENT COMPETITION AND EFFICIENCY
BY REQUEST OF GOVERNOR

12/31	INTRODUCED		
1/02	FISCAL NOTE REQUESTED		
1/03	REFERRED TO BUSINESS & INDUSTRY		
1/06	FIRST READING		
1/13	FISCAL NOTE RECEIVED		
1/14	FISCAL NOTE PRINTED		
1/17	HEARING		
1/30	TABLED IN COMMITTEE		
3/03	MISSED DEADLINE FOR 45TH DAY TRANSMITTAL		
	DIED IN COMMITTEE		

SB 79 INTRODUCED BY CHRISTIAENS *LC0387 DRAFTER: CAMPBELL*

CREATE A MONTANA LIVING TRUST ACT
BY REQUEST OF STATE AUDITOR

12/31	INTRODUCED		
1/02	FISCAL NOTE REQUESTED		
1/03	REFERRED TO JUDICIARY		
1/06	FIRST READING		
1/10	FISCAL NOTE RECEIVED		
1/11	FISCAL NOTE PRINTED		
1/27	HEARING		
1/30	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/31	REVISED FISCAL NOTE REQUESTED		
2/01	2ND READING PASSED	45	0
2/03	3RD READING PASSED	50	0
	TRANSMITTED TO HOUSE		
2/04	FIRST READING		
2/04	REFERRED TO JUDICIARY		
2/06	REVISED FISCAL NOTE RECEIVED		
2/06	REVISED FISCAL NOTE PRINTED		
3/05	HEARING		
3/11	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
4/03	2ND READING CONCURRED	68	31
4/04	3RD READING CONCURRED	71	27
	RETURNED TO SENATE WITH AMENDMENTS		
4/08	2ND READING AMENDMENTS CONCURRED	50	0

4/09	3RD READING CONCURRED AS AMENDED	49	1
4/14	SIGNED BY PRESIDENT		
4/15	SIGNED BY SPEAKER		
4/15	TRANSMITTED TO GOVERNOR		
4/22	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 348		
	EFFECTIVE DATE: 10/01/97		

SB 80	INTRODUCED BY HERTEL	LC0333 DRAFTER: MALY
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PROHIBIT UNDERWRITING ON OR AFTER THE ISSUE DATE OF THE POLICY,
CERTIFICATE, OR SUBSCRIBER CONTRACT EXCEPT UNDER CERTAIN
CONDITIONS

BY REQUEST OF STATE AUDITOR

12/31	INTRODUCED		
1/03	REFERRED TO BUSINESS & INDUSTRY		
1/06	FIRST READING		
1/21	HEARING		
1/23	COMMITTEE REPORT—BILL PASSED		
1/24	2ND READING PASSED	48	0
1/25	3RD READING PASSED	46	0
	TRANSMITTED TO HOUSE		
1/27	FIRST READING		
1/27	REFERRED TO BUSINESS & LABOR		
2/05	HEARING		
2/06	COMMITTEE REPORT—BILL CONCURRED		
3/04	2ND READING CONCURRED	100	0
3/05	3RD READING CONCURRED	100	0
	RETURNED TO SENATE		
3/10	SIGNED BY PRESIDENT		
3/10	SIGNED BY SPEAKER		
3/11	TRANSMITTED TO GOVERNOR		
3/13	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 53		
	EFFECTIVE DATE: 10/01/97		

SB 81	INTRODUCED BY SWYSGOOD	LC0265 DRAFTER: ERICKSON
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REVISE THE LAWS PERTAINING TO THE LICENSING AND OPERATION OF
COMMERCIAL MOTOR VEHICLES

BY REQUEST OF DEPARTMENT OF JUSTICE

12/31	INTRODUCED		
1/03	REFERRED TO HIGHWAYS & TRANSPORTATION		
1/06	FIRST READING		
1/14	HEARING		
1/21	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/23	2ND READING PASSED	49	0
1/24	3RD READING PASSED	48	0
	TRANSMITTED TO HOUSE		
1/25	FIRST READING		
1/25	REFERRED TO TRANSPORTATION		
2/03	HEARING		
2/04	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/04	2ND READING CONCURRED	79	19
3/05	3RD READING CONCURRED	92	8
	RETURNED TO SENATE WITH AMENDMENTS		
3/10	2ND READING AMENDMENTS CONCURRED	50	0
3/11	3RD READING PASSED	50	0

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on January 27, 1997, at 10:00 a.m., in the Senate Judiciary Chambers (325) of the State Capitol, Helena, Montana.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Lorents Grosfield, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Sharon Estrada (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter L. McNutt (R)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Jody Bird, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 79, posted January 13, 1997
SB 176, posted January 14, 1997
Executive Action: SB 166 Tabled; SB 31 Do Pass
As Amended; SB 163 Do Pass As
Amended

DISCUSSION OF COMMITTEE BILL

Motion: **SENATOR MIKE HALLIGAN** made a motion to ask **Valencia Lane** to work with appropriate members of the Montana State Bar Association on a committee bill modifying inheritance laws in the State.

Discussion: **CHAIRMAN BRUCE CRIPPEN.** The President of the Senate has asked this committee to request legislation dealing with step-children and inheritance taxes. If a husband and wife marry

and have children that are under the age of 18 at the time of the marriage, these children are step-children and lineal descendants in the testate law. If the husband and wife marry and one of them has children above the age of 18, to qualify for the provisions of the inheritance tax rates these children would have to be adopted. Even though they may have gone for 60-70 years as a parent/child relationship, unless they were actually adopted, they are not treated as lineal descendants for inheritance tax purposes and would pay a much higher rate. I think this law is unfair and contravenes the intent of people, it is highly unknown that this situation exists in the law. This is appropriate and, as a matter of courtesy to the President, I think we ought to do it.

Vote: SENATOR HALLIGAN's motion carried 8-0. SENATORS ESTRADA, AND GROSFIELD were not present and did not leave proxy votes. This constituted 80 percent or more than the three-fourths vote required to request a committee bill.

Tape 1, Side A, #6.3, 9:40 a.m.

Motion: SENATOR HALLIGAN made a motion to allow Valencia Lane to work with the State Bar in creating a committee bill to address language changes in Montana's limited liability company or partnership laws, to ensure forming of these companies is being encouraged in Montana.

Discussion: CHAIRMAN CRIPPEN. This not unusual. This committee will probably do this more than any of the other committees, because often the bills deal with probate or some other section of the law that belongs before the Judiciary Committee. In the past, it has been the tradition for the President of the Senate to assign a request like this to the Senate Judiciary Committee.

SENATOR REINY JABS. Will these bills be heard by this committee?
CHAIRMAN CRIPPEN. Yes. The President will sign and present the first bill.

Vote: SENATOR HALLIGAN's motion carried 8-0, meeting the three-fourths requirement for a majority. SENATORS ESTRADA AND GROSFIELD were not present and did not leave proxy votes.

EXECUTIVE ACTION SB 48

Discussion: CHAIRMAN CRIPPEN. Are we still waiting for the fiscal note on SB 48? SENATOR HALLIGAN. The people concerned have met on this, and have zeroed out the fiscal note with some cautionary items. I believe the fiscal issues have been taken care of, but I don't want to push the bill if people are still uncomfortable with doing that. They have also identified several areas of concern by SENATOR JABS and SENATOR RIC HOLDEN, about whether we were mandating the family assessment centers. There is no mandatory or requirement language in the bill. If there is still a concern that we should hold the bill, I will defer to

that. I'd like it to have the full revised fiscal note before it goes to the floor.

SENATOR HOLDEN. I had an opportunity to look into this bill. While some of the fiscal note could have been zeroed out, it's not clear exactly how much has been. I think we need to wait for the fiscal note so we know exactly what we are talking about regarding these programs. I would like to know what the Department of Corrections thinks they will do with this piece of legislation. It should be reflected on the revised fiscal note. I'd ask to have it held at least a day until we can get a fiscal note. **CHAIRMAN CRIPPEN.** We don't have a fiscal note on SB 99 either. We will wait another day, but not much longer.

SENATOR JABS. I met with Director Day on both of these bills. I was assured it was zeroed out and that there was no fiscal impact of any consequence. The \$13 million is for secure care, but I understand your concerns.

EXECUTIVE ACTION SB 31

CHAIRMAN CRIPPEN. SB 31 has been rereferred to the Committee; however, **SENATOR LOREN JENKINS** isn't here. I'd like to get this bill out on the floor.

Tape 1, Side A, #11.6, 9:45 a.m.

EXECUTIVE ACTION SB 166

SENATOR HOLDEN. I have amendment 16610.avl for SB 166 which can be discussed today. This amendment strikes out everything up to page 5, line 2. On the back side of the amendment, as part of amendment 9, language is inserted to state, "if the spanking does not cause severe emotional harm to the child or harm to the child's health or welfare."

CHAIRMAN CRIPPEN. I would like a definition of severe emotional harm. **SENATOR HOLDEN.** "Emotional harm" could be broadly interpreted, whereas "severe" defines the word emotional more distinctly.

CHAIRMAN CRIPPEN. Another part provides for a substantive change in amendments #6, 7, and 8. **SENATOR HOLDEN** asked **Valencia Lane** to explain these parts of the amendment. **CHAIRMAN CRIPPEN.** You are getting into the publication of the offense; you're striking "involving an act of vandalism" on page 2, line 13. So it is just, "convicted of a criminal mischief for a first or subsequent offense". Why are you doing that? **Valencia Lane.** The amendments were drafted to take out all acts of public spanking, but it does leave one penalty in for vandalism and graffiti. It would provide that the judge could order public notification in the local newspaper concerning the sentencing for the act of vandalism, and would require the convicted person to pay for the cost of publication.

CHAIRMAN CRIPPEN. Do we have any precedent for that. **Valencia Lane.** I'm not sure.

SENATOR SUE BARTLETT. Am I correct in reading the amendment to apply only to public property? **Valencia Lane.** Yes.

SENATOR BARTLETT. That might present a minor conflict. The language to be inserted by amendment #7 specifies "public property" and the language in amendment #8 references "private or public property." **Valencia Lane.** You are correct, and I'm not sure it was intended that way.

CHAIRMAN CRIPPEN. What was intended? **SENATOR HOLDEN.** "Private" should be included in amendment #7 to make it consistent with amendment #8.

CHAIRMAN CRIPPEN. I would like to segregate these amendments.

SENATOR HOLDEN asks if this can be done. **Valencia Lane.** There are two concepts here: one is to amend the penalty for vandalism to allow for publication of the name and make the person pay for the notification; the other is to amend the existing laws on harm to children to say that spanking is not sexual abuse or physical injury if it does not cause severe emotional harm to the child or harm to the child's health or welfare. I'd have to go through and find which amendment goes with which concept.

Tape 1, Side A, #20.7, 10: 50 a.m.

Motion: **SENATOR HOLDEN** made a motion to allow the public notification in local newspapers concerning the sentencing for certain acts of vandalism, specifically concerning the placing of graffiti on private or public property without consent.

Discussion: **SENATOR BARTLETT.** Was **VICE CHAIRMAN GROSFIELD** interested in having the public notice in the newspaper exclusively in reference to crimes that involved graffiti on private or public property? **Valencia Lane.** It was my understanding that he wanted that for vandalism.

SENATOR BARTLETT. I don't believe that amendments #7 and 8 read together are as clear as **VICE CHAIRMAN GROSFIELD** would probably want them to be.

CHAIRMAN CRIPPEN. This is the heart of the issue. Should we, as a matter of public policy, require in cases like these that we go one step further than we do in any other criminal offense, and have a public notice put on record and require the defendant to pay for it?

SENATOR STEVE DOHERTY. The Committee has attempted to walk a fine line in protecting juveniles from publication, understanding that when kids go really bad we have to deal with them. When kids occasionally go bad, the Legislature had, historically, gone toward the direction of trying to keep juvenile crimes quiet. If

we're changing this for graffiti, as opposed to the other crimes, I'm not sure that may be a good public policy. We're giving this sentencing discretion to the judge. We're also not giving any direction to the judge about when it might or might not be an appropriate instance to impose this particular sentence. Hopefully, the judge would use sound discretion, but we're not giving any instructions in the amendment.

SENATOR HALLIGAN. The confidentiality provisions for juveniles were addressed during the past two legislative sessions, making most of these a matter of public record. We used to keep them quieter than we do, but for acts that are delinquent, the newspapers are reporting the names. I'm concerned because you have the potential for the victim's property being put in the newspaper, and you may want some confidentiality for the victim. The judges in Ravalli County are ordering some of this anyway, I think it is under the existing broad guidelines for sentencing. I think the whole bill needs to stay in the Committee. **CHAIRMAN CRIPPEN.** I want to get this thing out. All that was asked for is the right of the parent to spank.

SENATOR HOLDEN. I would like to withdraw my motion unless **VICE CHAIRMAN GROSFIELD** has some additional comments.

CHAIRMAN CRIPPEN. I suggest the Committee amend this bill to strike everything else out, and deal with the amendment on page 5, lines 3 and 8 pertaining to spanking.

Motion: **SENATOR HOLDEN** made a motion to approve the amendment suggest by **CHAIRMAN CRIPPEN**.

Discussion: **CHAIRMAN CRIPPEN.** By this amendment, the Committee will only deal with the issue involving spanking, and insert the language stating "if the spanking does not cause severe emotional harm to the child."

Valencia Lane. I am asking for clarification. The Committee is: 1) striking section 1 from the bill, which deals with criminal mischief and vandalism; 2) leaving in section 2 of the bill with an amendment to that section; and 3) striking section 3 of the bill which deals with juvenile court, so all that will remain in the bill is section 2 with amendments. When you read the amendment you read, "if the spanking does not cause severe emotional harm to the child." I assume that you want to continue with the amendment as written, "or harm to the child's health or welfare." **CHAIRMAN CRIPPEN.** That is fine.

Tape 1, Side A, #28.4, 10:05 a.m.

SENATORS GROSFIELD AND ESTRADA are present at this point.

Discussion: **SENATOR DOHERTY.** If I understand the motion, we're amending the definition of both physical injury and sexual abuse to make a statement that spanking is neither physical injury nor

sexual abuse, if the spanking does not cause severe emotional harm to the child or harm to the child's health or welfare. I think what we are trying to get at is a good thing, I don't know if these words get us there. If we have an individual who is charged with either physical injury or sexual abuse, their defense would now be expanded, i.e., their ability to avoid a guilty verdict on either one of those charges. Do we want to expand their ability to obtain a not guilty verdict by giving them the additional defense -in this instance- of saying, "it did not cause severe emotional harm to the kid when I hit him or touched him in that sexual way, it only caused him a minor degree of emotional harm or a moderate degree of emotional harm." This is something we need to be very careful of.

I don't know what the magic words are but I think these words give a potential defendant more defenses. **CHAIRMAN CRIPPEN.** You are absolutely correct; the language is a little vague. We can keep this bill or we can pass it out with this amendment - it's up to the committee.

SENATOR HOLDEN. We heard this bill quite some time ago. If **SENATOR DOHERTY** had some ideas or really wanted to bring ideas to the Committee, they'd be here. I think we should go ahead and vote.

SENATOR HALLIGAN. I'm asking for clarification on the motion. The motion is simply to strip the vandalism and criminal mischief part right now, isn't it? **CHAIRMAN CRIPPEN.** We're dealing with amendment #9 now, and everything else is still in the bill.

SENATOR HOLDEN. My motion is to strip everything from the bill, and insert the language in amendment #9 that deals with spanking.

SENATOR HALLIGAN. I request that the Chair segregate the motions, so we can vote on them separately. **CHAIRMAN CRIPPEN.** The Committee is voting on amendment #9 only right now.

Vote: **SENATOR HOLDEN's** motion to adopt amendment #9 passed in a roll call vote (6-4).

Motion/Vote: **SENATOR ESTRADA** made a motion to TABLE SB 166. The motion carried in a roll call vote (6-4).

HEARING ON SB 176

Sponsor: **SENATOR JOHN HERTEL, SD 47, Moore**

Proponents: Vern Peterson, Fergus County Commissioner
Gordon Morris, Director, Montana Association of
Counties (MACO)

Opponents: Russell Hill, Montana Trial Lawyers Association
(MTLA)

Opening Statement by Sponsor: SENATOR JOHN HERTEL, SD 47, Moore.

This small bill, would correct a situation adversely affecting counties now. Counties are strapped for funds, and officials are trying to be as efficient as possible. Everyone is entitled to legal counsel. If people don't have sufficient funds, the Court determines whether court-appointed counsel is appropriate. This bill provides that such counsel would not be not determined merely by substantial hardship in providing for personal or family necessities.

In some cases, we believe the people can afford their own counsel. Thus, more emphasis should be placed on what the individual owns and has in his possession at the time. The bill strikes "without substantial hardship in providing for personal or family necessities." A financial statement would still be used to determine indigence. Others here can explain this legislation in greater detail.

Proponents' Testimony:

Vern Peterson, Fergus County Commissioner. It's becoming more difficult every year to fund justice and district courts. Rather than trying to increase those budgets, we need to try to put the responsibility back on the individual and off the taxpayer as much as possible. This bill is a small step in that direction. I've seen people driving much newer vehicles than do, who have court appointed counsel. It is not fair to the taxpayer to continue that. We have increased these line items almost continuously since I've been a county commissioner. This year we've expended 75 percent of our line item in the first half of the year, although we felt the budget was sufficient when the year began. This is simple legislation. Substantial hardship probably means something different to everyone; therefore, the bill would be better off with this language stricken. Instead it requires a sworn financial statement as to whether or not people are eligible for counsel. This bill puts responsibility where it belongs, and that is with the individual.

Gordon Morris, Director, Montana Association of Counties (MACO). This is a MACO issue, supported by the membership. We ask for your favorable consideration of this bill. It doesn't change a lot, other than requiring a sworn financial statement rather than demonstration of hardship.

Opponents' Testimony:

Russell Hill, Montana Trial Lawyers Association (MTLA). We oppose removal of the language regarding substantial hardship. I urge the Committee to look at the difference between the comments that were made on cost-savings, as a potential from this bill, and the underlying sense we all have that it's a certain unfairness, or that we ought to additionally punish people who require court-appointed counsel. The only reference to abuse that I heard has to do with defendants driving nicer cars than

other people at the same time that they have court-appointed counsel. That is offensive to everybody, but the fact is people have living standards when they are charged with a crime.

This bill raises real problems with the current financial status of a defendant, whatever their indebtedness is or their possessions already are. The fiscal note is "very squishy" in terms of cost savings. It doesn't explore the possibility that by denying defendants counsel, you may actually increase costs because you have litigants representing themselves, and more vulnerable convictions. When a truly joined adversarial system doesn't exist, the prosecution has a smoother skate. Indigent does not mean destitute. You don't have to be completely unable to afford expensive private counsel in order to be indigent. What this bill does, is get into a defendant's ability to support his family. Financial resources of others are irrelevant to the defendant's ability to pay. This bill may have symbolic value, but I don't think it will have much realistic value.

Questions From Committee Members and Responses:

SENATOR BARTLETT. Please give examples of what a judge might consider to be included under substantial hardship in providing for necessities that you might disagree with. Has this caused a county to have to pay for the criminal defense of a defendant when you thought it was inappropriate? **Commissioner Peterson.** I am not sure. I think substantial hardship means something different to every judge. This is part of the clarification that I hope we would gain by removing that language. For the most part they would probably look at providing for the family.

SENATOR DOHERTY. Which counties have had to provide funds for legal representation, in the last two years, in justice and district courts where the judges have abused the direction that is currently in the statute? Statute says they have to consider, on the basis of sworn statements, an individual's ability to provide personal or family necessities before ordering that kind of representation. **Gordon Morris.** I can't tell you of any instances where the judges have abused this section of law in terms of determining whether or not there is substantial hardship on an individual before making a determination they are indigent, and, therefore, eligible for court ordered representation.

Tape 1, Side A, #46.0

SENATOR DOHERTY. Why, as a matter of public policy, is it a good idea to take out the direction of substantial hardship? **SENATOR HERTEL.** There are instances where the financial statement is not looked at hard enough. If this were studied more diligently, perhaps it would be emphasized more.

Tape 1, Side B, #00

SENATOR DOHERTY. Did you contact anyone from the County Attorney's office in Fergus County to find out if the individuals driving a nicer car than yours had submitted false statements to the Justice of the Peace or District Court to qualify for the Judge ordering legal representation? **Commissioner Peterson.** Yes, I have followed up on several different occasions. The investigation of a financial statement is another burden that would be required. They don't have the time to investigate them. We have one full time attorney and no deputy. I have been told that as long as people sign their statement, if something comes up down the road, we can prosecute. However, he has never investigated to the point of finding out if there was a false statement.

SENATOR HALLIGAN. Help me to understand the district court reimbursement program. **Mr. Morris.** The district court reimbursement program was passed in 1985. The money for that program, reimbursing counties for criminal costs associated with district court trials, comes from the 7 percent portion of the 2 percent motor vehicle fees that are collected statewide. On an annual basis, this amounts to approximately \$3.5 million, which is then available, under the administration of the Supreme Court, for reimbursement to local government to offset the costs associated with indigent defense, court ordered legal representation, psychological exams, and jury trials associated with it. That program has annually paid out all of the money it collects.

SENATOR HALLIGAN. Is there more demand on that fund? Is that where the county property taxes potentially come in to fund the public defenders that may have been referred to by the Fergus County Commissioner? **Mr. Morris.** That is correct. This is a District Court reimbursement program as opposed to Justice of the Peace Courts.

SENATOR HALLIGAN. Do you have information from MACO on how most counties handle their public defender? Are they on staff or on contract? **Mr. Morris.** On a statewide basis, most of them are under contract with the counties. An outside legal firm provides public defender services to the county.

SENATOR HALLIGAN. Are the contracts set prior to that, and does an attorney have to take every case that is assigned to him? How do those costs increase? **Mr. Morris.** If I understand the question, most of the contracts would have a threshold provision covering "x" number of cases to be taken by that firm/attorney and there would be a mechanism for anything in excess of that. We know there are more people using court-appointed attorneys than ever before. We're trying to provide an adequate test to make sure they're clearly indigent, and don't have the financial wherewithal to handle their own representation.

SENATOR HALLIGAN asked that **Mr. Morris** check a couple of counties for the Committee, and let them know what those contracts say in terms of volume and if there are thresholds.

VICE CHAIRMAN GROSFIELD. How does this work in the practical sense? You are dealing with the criminal code, so you are talking about someone who is charged with a crime and they go to the court and say they can't afford a lawyer? We don't know how much it is going to cost because it depends on how tough the case gets? Perhaps the defendant might think initially it will cost less than it really does. How does a judge make a determination when he doesn't know the costs up front? **Mr. Morris.** I'm not in a position to answer this question. I'm not sure how you measure that or that the judges know how.

VICE CHAIRMAN GROSFIELD. Are we saying a person will have to sell their assets before the judge will determine indigence, by eliminating substantial hardship and talking about financial inability? **Mr. Morris.** I thinks it is as simple as submitting a sworn financial statement demonstrating financial inability.

VICE CHAIRMAN GROSFIELD. A sworn statement may say there is no way I can afford this unless I sell the house. That is the way the judge will read it. What is your intention here, that I sell the house? **Mr. Morris.** I think the individual's assets should be the first line of defense in terms of paying for the cost, not the taxpayers'.

CHAIRMAN CRIPPEN. Is it the intent of this bill, should it pass, is that it reduce costs to the taxpayers as far as providing counsel for those people in criminal cases only? **Mr. Morris.** That is correct.

CHAIRMAN CRIPPEN. What if you require an individual to provide his/her counsel on a criminal case, and he/she ends up spending several thousands of dollars and that individual is then found to be not guilty? Is there any provision in the law that allows that individual to recoup his/her legal expenses? **Mr. Morris.** There is no recourse at that point, as far as I know.

Closing by Sponsor:

SENATOR HERTEL. I thank the Committee for a good hearing. We're trying to make this a fair situation. There are those who need the help the statutes provide today; however, we feel that for those who can afford it, they should be required to pay. We are not attempting to punish anyone anymore than what they are already getting applied to them. This is a fairness issue, with an emphasis on looking at the financial statement and evaluating it before a determination is actually made.

HEARING ON SB 79

Sponsor: **SENATOR CHRIS CHRISTIAENS, SD 23, GREAT FALLS**

Proponents: Clyde Dailey, State Auditor's Office, Insurance
Department
Bob Pyfer, Montana Credit Unions League
Tom Ellis, Norwest Bank
John Cadby, Montana Bankers Association
Verner Bertelsen, Montana Senior Citizens
Association
Susan Good, Montana Association of Life Underwriters
Beth Baker, Department of Justice
Gene Hoffman, Retiree
Irene Thewer, American Association of Retired
Persons (AARP)
Greg Overturf, Department of Commerce

Opponents: None

Opening Statement by Sponsor: SENATOR CHRIS CHRISTIAENS, SD 23,
Great Falls. SB 79 creates the Montana Living Trust Act. This
amendment and testimony from the Supreme Court address living
trusts (EXHIBITS #1 and #2). Living trusts are devices whereby
one protects assets from estate and other taxes. In Montana,
present regulation of living trusts is extremely limited.
Problems have arisen because insurance and security agents, with
histories of disciplinary problems, have begun to sell these
products statewide. These fill-in-the-blank living trusts are
overpriced, and can seriously complicate the settlement of
estates.

An article published in the November 23, 1996 issue of Montana
Law Week, cites a special concurrence of the majority of the
State Supreme Court, noting that an unregistered, unlicensed
salesman had sold 200 living trusts in 3 states, including
Montana. One Montana family paid more than \$2,000 for a living
trust that ended up causing them serious problems in the handling
of that estate.

This bill provides clear regulation in the marketing and sale of
living trusts. It also sets forth criminal and civil remedies
for fraudulent and deceptive sales practices.

Tape 1, Side B, #15.6, 10:40 a.m.

Specifically, the bill 1) requires the person selling a living
trust to obtain a license from the State Auditor; 2) allows the
Auditor to issue an order denying, suspending or revoking any
pending or approved application or license to sell living trusts
in the State if it is in the best interest of the public; 3)
requires the Auditor to keep a register of all license
applications, to remain open for public inspection; 4) requires
licensees to maintain accounts and other records as required by
the State Auditor's office; 5) makes it illegal to defraud
Montanan's in an offer and sale of living trusts; 6) makes it
illegal for a person to sell a living trust to a person for whom
a living trust might not be suitable.

Having had a living trust in my family for over 30 years, I can tell you that many times people enter into these without fully understanding the ramifications. You don't understand the ramifications until there is a death in the family in which there is a living trust involved. It causes many problems when these trusts have not been kept up to date. In the case of my family, the trust was set up by someone from out of state who lost track of the family and only contacted us once in over 30 years. This bill goes a long way toward protecting Montana's citizens in the purchase of a vital estate planning mechanism, a living trust.

Tape 1, Side B, #17.0, 10:41 a.m.

Proponents' Testimony: Clyde Dailey, Insurance Division, Office of the State Auditor. This bill is a compromise after many years of trying to figure out what to do with living trusts. We have worked with the Department of Commerce, the Attorney General's office and others during this period. Currently, the only regulation of a living trust is through the Department of Commerce. We're asking that sellers of these trusts register with the State, so we know who and where they are.

The amendments deal primarily with licensing, and enable us to collect the appropriate fees for same. We hope this will help to resolve the problems encountered as a result of less than scrupulous individuals coming through the State with their seminars. They get people to pay anywhere from \$300-\$3,000, and then leave the State. Mr. Dailey read an article on "wolf packs" or "trust mills" to the Committee.

Bob Pyfer, Montana Credit Unions League. When we began getting calls from credit unions whose members were asking to have their shares put into an outside living trust, we developed procedures and forms to allow credit unions to do this properly. Consequently, we became aware that many, mostly older members were being bilked into paying exorbitant prices for "boilerplate" language that wasn't even customized to fit the individual members' needs. As a result, we developed a standard newsletter article for credit unions warning members about living trust scams. We also had conversations with the senior citizens ombudsmen and the Business Law Section of the Montana Bar Association. Eventually the Bar Association put together a pamphlet called, Living Trust Scams and Older Customers, and we distributed this pamphlet through credit unions to their members. (EXHIBIT #3).

Evidently, consumer education efforts haven't solved this problem, so a narrowly-drawn, targeted program to address this problem does appear to have merit. We ask for one amendment on page 1, line 26, to specifically exclude POD (payable on death) accounts from the definition. These accounts are passed on to a beneficiary when the owner dies. Under the old law these are sometimes called living trusts; however, we want to make clear that these are not living trusts for purposes of this act.

Tape 1, Side B, #22.0, 10:47 a.m.

Tom Ellis, Norwest Bank. On January 17, 1997 Norwest Bank completed it's 99th year of exercising trust powers and providing trust services to over 3,000 Montana residents, who have entrusted almost \$2 billion to us. Trust accounts can be very valuable and, if utilized properly, can provide additional financial security to families and beneficiaries. A considerable amount of federal law, as well as state law, has been developed to protect trustors, trustees and beneficiaries and to provide a means by which trustees can carry out their duties and responsibilities efficiently and safely.

It has been mentioned that there are a lot of boilerplate plans. We've seen those in the commercial side of the bank. Interestingly, none of the 3,000 accounts that we administer at Norwest are alike. Each trust account is governed according to a trust agreement which has been prepared by a legal professional, usually an attorney practicing law in Montana.

The trust area of commercial banking is probably the most regulated area in the bank, as we have a lot of discretion over assets. A trustee has the discretion to do a lot of different things and needs to know what their duties and responsibilities are. Trustees need to be accountable to the beneficiaries. Because bankers and trust officers are regulated, they receive oversight for the sale and administration of financial services.

Insurance sales, real estate sales, stock and bond brokers are regulated and licensed. Even contractors, electricians and plumbers are subject to oversight. At least a consumer has some place to go if they think they have not been treated correctly. Many very vulnerable individuals often do not understand the means of transferring their assets to a trust and many trustees do not understand their duties and responsibilities in carrying out the administration of a trust. (EXHIBIT #4)

John Cadby, Montana Bankers Association. We support this bill for the reasons already expressed. I want to bring to your attention that most banks in Montana do not have trust powers. There would be very few exempted by the amendment proposed on page 2, line 5-7. I wonder if we should add "trust corporations" following "national bank" in this amendment. In Montana, two or three trust corporations are regulated and audited by the State just like banks.

Verner Bertelsen, Montana Senior Citizens Association. We strongly support this legislation. Senior citizens, especially those that are alone, are very vulnerable to the unscrupulous efforts of agents, who talk them into some scheme and take their money. We support the protection this legislation would give.

Susan Good, Montana Association of Life Underwriters. The Association supports this bill, with a couple of comments for

consideration during executive session. In the past, this has been in the province of the Department of Commerce and the Attorney General. The way some of living trusts are being marketed, is almost tantamount to practicing law without a license. We would offer that the Committee might want to have someone other than the State Auditor regulate this.

The Association would like to go on record as clearly opposing the "wolf packs" discussed today. Anytime there is fraud in the insurance industry, the Montana Association of Life Underwriters strongly supports prosecuting such persons to the full extent of the law.

Beth Baker, Department of Justice. The Department supports this bill. Our involvement in this issue began in 1991 when then Attorney General, Marc Racicot, wrote to the State Bar encouraging public education concerning the potential problems involved in the marketing of living trusts.

Later, the Department met with concerned members of the Montana Bankers Association and the Tax and Estate Section of the Montana State Bar. We met with the Department of Commerce and the State Auditor to figure out how to deal with this. We all agreed that our current consumer protection laws didn't really address this problem.

The brochure you heard mention of was developed and published by the American Association of Retired Persons (AARP) and Dean Eck of the University of Montana School of Law. It is widely disseminated by the Consumer Affairs Office, and we believe it has helped in the prevention some problems with the sale of living trusts. The targets of this fraud are usually older consumers, and we believe the bill will help protect them.

I brought a copy of a Senior Consumer Alert, prepared by the National Association of Attorney's General and the AARP, that could be consulted to learn more about the problems consumers have had with these types of things and the efforts that have made to correct them (**EXHIBIT #5**).

Tape 1, Side B, #313, 10:56 a.m.

Gene Hoffman, Retiree. I stand in support of this bill because my parents were two of the people who were ripped-off. They are two of the greatest people in the world, are well-educated, they love Montana and the life they have had. A man walked in the door and sold them a living trust. I happened to be in Missoula, and when I returned Dad told they bought a living trust. I asked if he wrote them a check, and he had. I suggested stopping payment on the check, but my Dad is the kind of guy that when he shakes a man's hand, that's it - so the check went through.

I looked at the document when it arrived. It stated that if they had not filed all the documents related to the trust, it would be

of no use. That means their house and all their property that wasn't placed in this trust, yet they paid the full bill. It gave an 800 number in California to call, but that number had been disconnected. Their office was in California, the lawyer was in Wyoming, and the trust was sold through an insurance company.

I suggest a fine be added to this bill of \$20,000. Also, the Committee may want to require that licensees be bonded in an amount large enough to handle a claim, and there is presently no recourse for a person who buys one of these living trusts.

Irene Thewer, AARP. The Associations recommends a do pass on this legislation. Many times elderly people will welcome people in because somebody nice comes to the door to talk with them and that is how they get hooked.

Greg Overturf, Department of Commerce. I work closely with the Consumer Affairs Office, and we would like to go on record in support of this bill. We have a large number of complaints and inquiries every year - over 750 last year - dealing with this subject, and we feel that the present laws are not adequate.

Opponents' Testimony: None

Questions From Committee Members and Responses: **VICE CHAIRMAN GROSFIELD.** Where is the right place for this? Is it the State Auditor, the Department of Justice or the Department of Commerce? **Beth Baker.** I think the reason the Attorneys General nationwide have been involved with this issue is that in many states it is the Attorney General's office that handles consumer protection. Many states have put their living trust regulations in their consumer protection and unfair trade practices acts.

I think if the committee is inclined to move jurisdiction, it would be more appropriate in the Consumer Protection Office. I don't know that it belongs better in either place. The State Auditor has similar regulatory functions with other types of advisors, and so it would probably be just as appropriate there. I don't think it would be appropriate to put it in the Department of Justice, because we don't do other consumer protection matters right now.

SENATOR HALLIGAN. Was bonding thought about in drafting the bill or have any of the departments looked at that? **Clyde Dailey.** We looked at all aspects of bonding, but given the present concern among general public about over-regulation, we felt that taking the strongest approach might limit the bill's chance of passing the legislature. We tried to stay with the regulatory scheme we currently have in both insurance and securities.

SENATOR SHARON ESTRADA. It appears that bonding an individual and raising the fine might be a good idea. Do you think there are any problems with that? **Clyde Dailey.** We are always

amenable to improving the bill and, if bonding is something the Committee would like to take a look at, we're happy to work with you on it.

VICE CHAIRMAN GROSFIELD. Is the \$75,000 in the State Auditor's budget? **SENATOR CHRISTIAENS.** The \$75,000 would come from fees and would have to be coordinated through the Auditor's budget. We think the fees would cover this amount.

SENATOR AL BISHOP. I note that you've exempted attorneys from the provision of this act. In preparing these living trusts many attorneys will use a CPA. What would be the effect on that? Would they have to get approval from the State Auditor? **SENATOR CHRISTIAENS.** They would not because a CPA will generally work with an attorney in drafting of living trust between.

SENATOR BISHOP. Why does the bill say revocable trust? Why not revocable or irrevocable? **SENATOR CHRISTIAENS.** I believe you have more control of one than the other, as you can make changes to a revocable trust. Once irrevocable living trusts are written, they generally remain the same. Perhaps **Clyde Dailey** might like to go into that a little further.

SENATOR BISHOP. It seems to me it would be more heinous for somebody to set up an irrevocable trust than a revocable trust. You could do something with a revocable trust, at least you could revoke it. If it is irrevocable you are in a world of hurt. **Tom Ellis, Norwest Bank.** I called the Auditor's office in December, 1996 when I saw the first draft of this bill, and asked them the same question. My personal preference would be to see irrevocable trusts covered as well as revocable trusts. The big difference is a revocable trust can be revoked by the trustor, the person who created the trust. An irrevocable trust, once established, is irrevocable. Some of the problems we have seen relate to irrevocable trusts. People transfer their assets in trust to a trustee irrevocably.

Changed to Tape 2, Side A, #00, 11:08 a.m.

VICE CHAIRMAN GROSFIELD. I cannot find any fees in this bill. I see some fines that go to the General Fund. Actually this costs \$90,000, not \$75,000. It is projected to be offset a little bit by fines. How many licenses might we be looking at in any one year, and how much would we have to charge them in order to take care of that \$90,000? **Clyde Dailey.** The amendments address most of these questions. The fee schedule is the same as if you were going to be what is defined as a registered investment advisor. I believe the fee is \$50 per entity you represent. If it is the brokerage itself, it is \$200.

VICE CHAIRMAN GROSFIELD. Do you think there are 1,000 entities that are likely to apply for this? **Clyde Dailey.** There are a lot of them out there. We've never tracked them because we've never asked them to register before.

SENATOR HOLDEN. Do you have fraud statutes on the books now?
Greg Overturf, Department of Commerce. We've primarily dealt with this under the Consumer Protection Act, specifically using the Personal Solicitation Sales Act which enables purchasers to revoke for a given period of time. We've had some success with that; however, the Consumer Protection Act doesn't quite fit here. We believe it would be very useful to have people register.

SENATOR HOLDEN. Can anyone go to an attorney in Montana and have this set up? Could we amend the Consumer Protection Act with regard to this issue without creating a whole new agency?
Greg Overturf. It could be done, with extensive revision - you would have to set up provisions to register people - but it doesn't really fit very well.

SENATOR BARTLETT. As the bill was originally written, it appears that only fines were contemplated as a funding source, and that the registration fee was added. I'm wondering if you want to have the sponsor request a revised fiscal note. **Clyde Dailey.** We had anticipated that. Contingent upon the amendments passing, we would definitely request an amended fiscal note. We can request it immediately if that is the pleasure of the Committee.

CHAIRMAN CRIPPEN. Were these amendments are drafted by the Department? Please work with **Valencia Lane** to get them in order so they will fit in the bill. **Clyde Dailey.** I will E-mail them.

Tape 2, Side B, #6.6, 11:15 a.m.

CHAIRMAN CRIPPEN asked **SENATOR CHRISTIAENS** to work on revising the fiscal note based on the amendment.

Closing by Sponsor: **SENATOR CHRISTIAENS.** I believe this is an extremely important bill. We discussed the fees and what they should be reflecting as far as income when the fiscal note came out. It is difficult to come up a figure when we really don't know how many people are in the state selling living trusts. One reason this legislation is attached to the State Auditor's office is that they already regulate and handle securities- and insurance-related consumer complaints, and so it seemed to be a natural fit.

Boilerplate language definitely does not fit everyone's needs as they are purchasing living trusts. I believe this bill may save a lot of consumers great heartache down the road. I urge your support.

Tape 2, Side A, #9.2, 11:17 a.m.

EXECUTIVE ACTION ON SB 166

Amendments: sb016601.avl

Motion/Vote: VICE CHAIRMAN GROSFIELD made a motion to adopt amendment 10, last page of 016601.avl, and to delete all of Section 3. The motion carried unanimously.

CHAIRMAN CRIPPEN advised the Committee that amendments 9 and 10 have been adopted. VICE CHAIRMAN GROSFIELD asked if amendment 9 was adopted with the word "severe" included.

Tape 2, Side A, #12.8, 11:22 a.m.

VICE CHAIRMAN GROSFIELD. Amendments 1-8 deal with Section 1 of the bill. I would like to either amend it as indicated here or strike it from the bill. These amendments don't give the judges any authority they don't already have, but do give them a hint that we would like to see a lot more of that. This bill has been a relatively high visibility bill and including these amendments in the bill might give them a strong hint.

Motion: VICE CHAIRMAN GROSFIELD made a motion to adopt amendments 1-8, 016601.avl.

Discussion: SENATOR HOLDEN. I already made a motion to adopt these amendments while VICE CHAIRMAN GROSFIELD was out of the room. We discussed it quite a bit, and I decided to withdraw the amendment.

VICE CHAIRMAN GROSFIELD withdrew his motion to adopt amendments 1-8, 016601.avl.

Motion/Vote: VICE CHAIRMAN GROSFIELD made a motion to strike Section 1 from SB 166, and modify the title accordingly. The motion carried unanimously.

Motion: VICE CHAIRMAN GROSFIELD made a motion that SB 166 DO PASS AS AMENDED.

Discussion: SENATOR DOHERTY. If you believe you were making a statement that parents can, under appropriate circumstances, discipline their kids by spanking them, that is a good thought that we share. I think the mischief in the amendments make this a bill that provides an opportunity for individuals who are charged with physical injury or sexual abuse to children, by giving them an extra defense.

I have not seen an instance when the prosecutors of Montana have violated their charge when people have either physically or sexually abused kids and overstepped their bounds. I think we are making it more difficult to convict those individuals, and I

charged with physical injury or sexual abuse to children, by giving them an extra defense.

I have not seen an instance when the prosecutors of Montana have violated their charge when people have either physically or sexually abused kids and overstepped their bounds. I think we are making it more difficult to convict those individuals, and I don't think that is a good thing to do as a matter of public policy.

SENATOR BARTLETT. I sympathize with the intent, but am curious to know if anyone has seen the language that the Department is proposing which addresses this same issue in a different bill. Is that language any more definitive or easily identified as to what is and is not physical abuse? **SENATOR HALLIGAN.** I heard from Anne Gilkey of the Department that they were looking at something substantial.

{Tape: 2; Side: A; Approx. Time Count: #19.0; Comments: 11:28 a.m.}

SENATOR BARTLETT. While I think I understand what people are trying to accomplish, and I don't have any objections to the real purpose here, I don't think this language does it. It is wide open for people's judgements yet again. Someone will end up having to determine whether or not a spanking, or some other physical punishment that a parent administered to a child, did or did not cause severe emotional harm or harm to the child's health or welfare. I think that is exactly the situation we're in now that has some people concerned about the authority of the Family Services Division of the Department of Health. I don't think this language does much to clear any of those situations up.

Motion: **SENATOR ESTRADA MADE A SUBSTITUTE MOTION TO TABLE SB 166.**

Discussion: **SENATOR HALLIGAN.** I support of the motion. I've prosecuted these kind of cases for five years when I was with the County Attorney's office. I guarantee what we, as relatively normal people, think of disciplining our children is far different than the pictures I saw - almost on a weekly basis - of kids who were severely injured because of parental discipline. When you use the word severe, the context is far different and there is a range in there we don't want to allow.

VICE CHAIRMAN GROSFIELD. I opposes the substitute motion. I think we have a bill that makes a statement now, and it is a statement we ought to make. I call your attention to page 5, line 1. We use the word "severe". Current law uses the word "excessive", so the language to be interpreted is already there. It doesn't seem any more difficult to interpret "severe emotional harm or excessive corporal punishment." We always have the problem of interpreting adjectives in a court setting. This is the nature of the system.

SENATOR HOLDEN. SENATOR HALLIGAN pointed out that the Department is going to help us out, but we have been waiting and haven't seen it. We have to help ourselves, the department isn't going to do it. I oppose the motion to table the bill.

Motion: SENATOR ESTRADA'S MOTION TO TABLE SB 166 CARRIED 6-4 IN A ROLL CALL VOTE WITH SENATORS HOLDEN, JABS, GROSFIELD AND CRIPPEN VOTING NO.

EXECUTIVE ACTION ON SB 31

Amendments: VICE CHAIRMAN GROSFIELD. Amendment 3103.avl takes out any reference in the bill to the concept of surgical castration. The emphasis on this bill, as far as public understanding, of it has been focused on the word castration. If you look at page 1, line 20, that has always been at the discretion of the convicted person. I would like this bill to go out on the merits of the chemical treatment issue.

Motion/Vote: VICE CHAIRMAN GROSFIELD MADE A MOTION TO ADOPT AMENDMENTS sb03103.avl. THE MOTION CARRIED UNANIMOUSLY.

{Tape: 2; Side: A; Approx. Time Count: #25.3; Comments: 11:35 a.m.}

Motion: VICE CHAIRMAN GROSFIELD MADE A MOTION THAT SB 31 DO PASS AS AMENDED.

Discussion: CHAIRMAN CRIPPEN. It is my understanding that this bill does not make chemical treatment voluntary. VICE CHAIRMAN GROSFIELD. It makes it voluntary for the judge, but not voluntary for the convicted person. The judge can order voluntary chemical treatment in cases where he thinks it will work. From a fiscal perspective we may end up with a net savings.

CHAIRMAN CRIPPEN. What is the purpose of line 29, prior to chemical treatment, that the person must be fully medically informed of its effects? VICE CHAIRMAN GROSFIELD. There was some indication in testimony that the drug may have some side effects in some cases. I think it is appropriate for the person to be fully medically informed, so if they have a condition that might become a problem with this drug, they can ask that to be taken into consideration.

{Tape: 2; Side: A; Approx. Time Count: #29.7; Comments: 11::40 a.m.}

CHAIRMAN CRIPPEN. For the voluntary aspect that would be fine, but for the discretionary aspect the person can be fully informed but there is nothing to provide for the Court to consider that. I don't see anything in here that would put parameters on the latitude of the Court to do that. The Court can choose to ignore that, but if the person has a problem later on and becomes

medically injured by this, it may result in a lawsuit with the state.

SENATOR DOHERTY. Is there is any other section of our criminal code dealing with sentences in which we give a judge the authority to order a medical procedure to be done? **CHAIRMAN CRIPPEN.** Only as far as pre-sentencing and a psychological examination.

SENATOR DOHERTY. We're giving a judge the authority to order, as part of a sentence, that somebody take a certain medication. I'm uncomfortable with making judges make that decision. **CHAIRMAN CRIPPEN.** Do you have an amendment you would like to add, perhaps to give some direction to the Judge?

SENATOR BISHOP. During a case in Billings, the Judge had to decide whether or not to order him to take medication and, I think, eventually the Judge did order him to take medication. Apparently, that can be done, so I don't see anything unusual about that. **CHAIRMAN CRIPPEN.** I question if that would go to the issue here, to chemically castrate an individual.

SENATOR HALLIGAN. I called Mike Scolatti last week who is an expert in this. Mr. Scolatti indicated he has seven men at the prison taking Depoprovera. It doesn't affect the motivational factors so the anger, power and control parts still need to be addresses. It affects the testosterone level by reducing it to pre-puberty levels, which is why they get reduced sexual drive. Less than 5 percent of sexual offenders convicted are eligible for chemical treatment, because they don't have the willingness to make it work.

Remember, that 95 percent of those offenders Mr. Scolatti is dealing with don't offend with the penis, they do it with their tongue or finger when they re-offend. We've been talking about one-third of the issue here. You can put it in the law, but you've got to make it so the Judge can order the sex offender test, and if you are capable of doing it, get it ordered that way. That way we know we are doing it with a voluntary population, because forcing it on someone who may get out of prison early, will put a dangerous person on the street.

Mr. Scolatti said, within a week of cessation of treatment, the testosterone level goes up to normal. We need to take a fine area here and make sure it is being used appropriately.

CHAIRMAN CRIPPEN. We've discussed the broad aspects of the bill in previous discussions.

SENATOR ESTRADA. That 5 percent is good enough for me.

Vote: VICE CHAIRMAN GROSFIELD'S MOTION THAT SB 31 DO PASS AS AMENDED CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 163

Amendments: SENATOR DOHERTY. Amendment 16301.avl addresses the question of why to give the discretion to object just to the prosecution. Why not give it to both sides? John Connor of the County Prosecutor's Office indicate it would be acceptable to amend the bill so either party can object.

Motion/Vote: SENATOR DOHERTY MADE A MOTION TO ADOPT THE AMENDMENTS sb016301.avl. THE MOTION CARRIED UNANIMOUSLY.

Motion/Vote: SENATOR DOHERTY MADE A MOTION THAT SB 163 DO PASS AS AMENDED. THE MOTION CARRIED UNANIMOUSLY.

CHAIRMAN CRIPPEN Would this committee object to having this meeting go into the lunch hour?

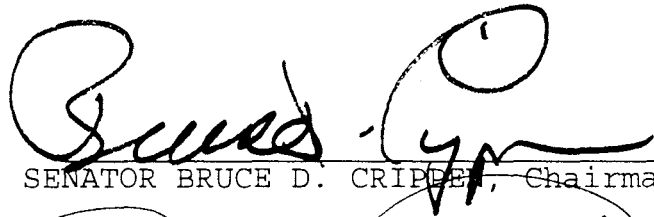
{Tape: 2; Side: A; Approx. Time Count: #40; Comments: 11:52 a.m.}

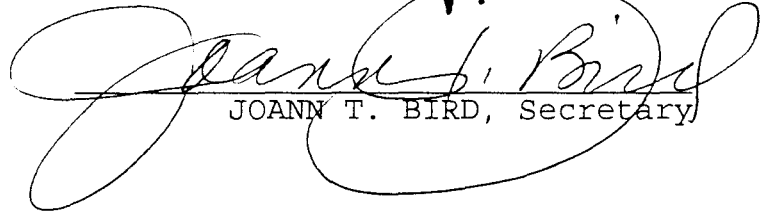
EXECUTIVE ACTION ON SB 176

Discussion: VICE CHAIRMAN GROSFIELD. I am uncomfortable with the way this bill is worded, but feel this may need to be addressed. I would like to put the stricken language back in, and then try to deal with the concept of substantial hardship. CHAIRMAN CRIPPEN asked that the amendments be prepared for tomorrow's meeting at 10:00 a.m.

ADJOURNMENT

Adjournment: 12 noon


SENATOR BRUCE D. CRIPPEN, Chairman


JOANN T. BIRD, Secretary

BDC/JTB

Proposed Amendment #1
S.B. 79
Introduced Bill Copy
January 24, 1997

1-27-97
SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 21
DATE 1-27-97
BILL NO. SB 79

1. Page 1, line 26.

Following: "(1)"

Insert: "(a)"

2. Page 1.

Following: line 26

Insert: "(b) The term does not include a POD designation as defined in 72-6-201."

3. Page 2, line 4.

Following: "person"

Strike: remainder of line 4 in its entirety

Insert: ":"

4. Page 2.

Following: line 4

Insert: "(a) is registered as an investment adviser or investment adviser representative under 30-10-201; and

(b) has applied for and been granted a license under this section."

5. Page 2, lines 5 through 7.

Strike: subsection (2) in its entirety

Insert: "(2) Subsection (1) does not apply to the preparation, acceptance or discussion of a living trust for an individual client, when the preparation of the living trust is based upon the client's particular financial circumstance, by:

(a) an attorney licensed to practice law in this state; or

(b) an employee of a state or national bank with trust powers."

6. Page 2, line 9.

Strike: "filing"

Insert: "license"

7. Page 2.

Following: line 9

Insert: "(4) A person may apply for a license to offer and sell living trusts by filing an application in the form that the state

auditor prescribes and paying the fee prescribed in subsection (5).

(5) The state auditor shall issue a license to offer or sell living trusts to a person who:

(a) is registered as an investment adviser or investment adviser representative under 30-10-201;

(b) correctly files an application for the license with the state auditor; and

(c) pays an application fee in the same amount as the amount paid by the person for original registration as investment adviser or investment adviser representative."

Renumber: subsequent subsections

8. Page 2, line 11.

Strike: "or approved"

Following: "application"

Insert: "or approved license"

9. Page 2, lines 11 through 15.

Strike: "the order" on line 11 through "(b)" on line 15

10. Page 2.

Following: line 17

Insert: "(5) The license is effective until December 31 following the issuance of the license, or other date that the state auditor prescribes by rule, unless suspended or revoked.

(6) A person may renew a license annually, prior to the termination date of the license, if the person:

(a) is registered as an investment adviser or investment adviser representative under 30-10-201; and

(b) pays a renewal fee in the same amount as the amount paid by the person for annual renewal as investment adviser or investment adviser representative."

11. Page 2, line 23.

Strike: "approval"

Insert: "licenses"

12. Page 3, line 1.

Strike: "the approval of the state auditor"

Insert: "a license"

13. Page 3, line 13.

Following: "fines"

Insert: "and fees"

14. Page 4, line 15.

Strike: "approval"

Insert: "a license"

15. Page 4, line 17.

Following: "application"

Insert: "for a license"

Leaphart, Turnage, Nelson, Erdmann, Gray. Trieweller and Hunt concurred as to dismissal of Clark's age discrimination claim and dissented as to the conclusion that he was not terminated. He was permanently terminated as terminal manager and then offered a totally different job that he had never performed before at substantially reduced pay. (When the Majority states that the record does not reflect whether there was a substantial change in salary it ignores Clark's affidavit.) The mere fact that he took the inferior position simply means that he tried to mitigate his damages; it does not change the fact that he was irreversibly terminated from his employment as terminal manager. This case is indistinguishable in any practical respect from *Howard*.

Clark v. Eagle Systems, Ackerman, Schweitzer, and Sundquist, 96-32, 11/20/96.

K.D. Peterson (Peterson & Schofield), Billings, for Clark; Steven Lehman (Crowley, Haughey, Hanson, Toole & Dietrich), Billings, for Defendants.

WRONGFUL DISCHARGE: Employee must be given copy of grievance procedures within 7 days of firing, even though previously given one... Rodeghiero reversed.

Adeline Eadus was fired by Wheatland Memorial Hospital in 7/94. She sued in 3/95 alleging wrongful discharge. Prior to trial Wheatland raised the issue of whether her action was barred by §39-2-911(2) because she had failed to exhaust its internal procedures. Judge Rodeghiero granted summary judgment for Wheatland, ruling that although Eadus had not received a copy of the procedures within 7 days as required by §911(3), Wheatland had substantially complied since the administrator had notified her of them at the time of firing and Eadus had received a copy in 1989. Eadus appeals.

Rodeghiero erred in granting summary judgment to Wheatland. Applying the plain language of §911(3), Eadus was not required to exhaust Wheatland's internal procedures because it had not provided her with a copy of them within 7 days of her discharge. Wheatland argues that it was not required to give her another copy because she had received one in 1989. It relies, as did Rodeghiero, on *Hoffman* (Mont. 1992). However, *Hoffman* did not address the "constructive notice" argument advanced by the employer and is also distinguishable on the dispositive fact that the employee had filed a wrongful discharge suit the day of his resignation.

Gray for the full Court.

Eadus v. Wheatland Memorial Hospital & Nursing Home, 96-306, 11/14/96.

Craig Holt (Holt Law Office), Billings, for Eadus; James Walen (Stacey & Walen), Billings, for Wheatland.

TRUSTS: Deceased's interest in accounts constituted "marital property," not available to fund bequests... trust minute invalidly executed... cotenancy equal interests rebutted, apportioned according to contribution... trustee entitled to fees/costs... Lympus affirmed, reversed.

Clifford & Mary Dern bought trust documents from American Family Living Trusts, under which marital property would become part of the Marital Trust Estate and go to the surviving spouse, and separate property would become part of the Separate Trust Estate and be distributed according to the Trust with any residue going into the Family Bypass Trust. The Bypass Trust named the surviving spouse as income beneficiary, and the surviving spouse and Dernas' descendants as principal

beneficiaries. Clifford's Separate Trust Estate provided that his property (timber parcels and the farm on which he and Mary lived) be distributed among his 4 children if he predeceased Mary. Mary owned property in joint tenancy with her 2 children which was never transferred to the Trust. The Trust provided for distribution of \$10,000 from Clifford's Separate Trust Estate to each of his 4 children. Clifford & Mary transferred to the Trust bank accounts and CDs (valued at \$73,923 at the time of Clifford's death in 12/91). In 11/91 they deeded 5 parcels of property to the Trust, and amended it by 4 trust minutes, the disputed one of which left the farm to Mary. After Clifford's death Mary signed deeds as trustee, conveying the real estate as provided for in the Trust. However, she subsequently learned from a lawyer that Clifford's son Derril was to succeed as co-trustee and his signature was required on the deeds. Derril refused to sign and this litigation ensued. Judge Lympus concluded that Clifford's half interest in bank accounts constituted part of the Marital Trust Estate and was therefore not available for the \$10,000 bequests and that the 4th trust minute was validly executed. The Dern children appeal. Mary cross-appeals denial of fees & costs.

Lympus correctly characterized Dernas' joint bank accounts and CDs as part of the Marital Trust Estate and therefore unavailable to fund the \$10,000 bequests to the Dern children. Because the Trust does not define what constitutes marital or separate property, intent of the parties must be discerned. Lympus found and the record indicates that Dernas treated their checking & savings accounts as marital property. The record clearly supports Lympus's determination that they regarded the Norwest accounts as marital property throughout their marriage. Consequently, these accounts became part of the Marital Trust Estate. Lympus also correctly found that the circumstances surrounding opening and use of the Whitefish account indicated that it was a joint account to be treated as marital trust property.

Lympus erred in determining that the 4th trust minute was validly executed. It was signed by Clifford alone, while reading all provisions together so as to give effect to all, it is clear that to amend the Trust, Clifford & Mary were required to act together and sign and date any such minute. Therefore, the farm continued as part of Clifford's Separate Trust Estate and became property of his children. While it is inconsistent that trust minutes 1, 2, and 3, each of which contains only 1 of the settlors' signatures, have likewise not been invalidated, the parties chose only to litigate the 4th minute.

Lympus, finding that the Norwest accounts were held in joint tenancy, correctly apportioned half their value to Clifford's interest in the Marital Trust Estate. He also correctly apportioned the Whitefish account, which they held as tenants in common, according to contribution. Because the evidence does not clearly prove that Clifford intended to confer his excess contribution to the account to Mary as a gift, the exception to the unequal contribution rule (relatives/spouses giving equal interest as gift) does not apply. Before apportioning the Whitefish account, deductions may be necessary to satisfy funeral expenses, costs, and fees. 60% of the remainder should be apportioned to Clifford's interest and 40% to Mary's interest in the Marital Trust Estate, as Lympus held.

Lympus erred in denying Mary her fees & costs. Costs

LIVING TRUST SCAMS And Older Consumers

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 3

DATE 1-2-97

HEA NO. SB 79

FOR MORE HELP CONTACT:

**Montana Department of Commerce
Office of Consumer Affairs**
1424 9th Avenue
Helena, MT 59620
(406) 444-4312

Montana Attorney General's Office
215 N. Sanders
Helena, Montana 59620
(406) 444-2026

**American Association of
Retired Persons**
601 E Street, NW
Washington, DC 20049

For educational information concerning
estate planning and living trusts, contact
your County Extension Service.



LIVING TRUST SCAMS

And Older Consumers

If you're age 60 or older, you should take special care when buying living trusts. Your age group is often a special target of slick-talking salespersons whose goal is to sell you something that you may not need.

It's easy enough to become a victim. Living trust sales are a growing area of consumer fraud. Con artists make millions of dollars every year selling unnecessary trusts. Each year, thousands of older consumers lose from \$500 to \$5,000 through the purchase of living trusts. Often, families face potentially greater costs after the consumer's death resulting from problems associated with the trusts.

To protect yourself, follow these guidelines:

1. Take time when making your decision. Do not fall victim to high-pressure "act immediately" sales tactics.
2. Seek the advice of someone trustworthy and knowledgeable. Contact your accountant, estate planning attorney, banker or financial adviser.
3. If you conclude that a trust may be right for you, deal directly with a licensed Montana attorney who has substantial expertise in estate planning.

REMEMBER: Most people who lose money in living trust scams never see a penny of it again. Further, their loved ones may face additional costs after the living trust consumer's death.

Fraudulent and Misleading Statements used in LIVING TRUST SCAMS

Con artists promote their business by making false or incomplete statements about the probate process, guardianships, and the taxation of estates. Such statements include:

1. Your estate can be reduced by a 55 percent death tax.

Misleading. Most Montanans' estates will face no death taxation at all.

There is no Montana inheritance tax on transfers to a spouse, children, or grandchildren.

The federal estate tax affects only those who have estates greater than \$600,000 in value which are transferred to someone other than a spouse or charity.

It is true that unplanned estates over \$3 million in value can face federal estate taxes at a marginal tax rate of 55 percent.

2. Living trusts save taxes.

Misleading. A living trust saves no more taxes than a will.

3. Living trusts help you avoid contested wills.

Misleading. Because a "trust" and a "will" are separate legal concepts, a trust is not subject to a will contest. However, trusts are subject to attack on the basis of lack of capacity, undue influence, and fraud. These same grounds can be used to contest a transfer by will.

4. Living trusts help you avoid your creditors.

False. During your lifetime, assets in a living trust are subject to the claims of your creditors. After your death, these assets are subject to the claims of your estate's creditors.

5. Living trusts avoid your spouse's claim to a share of your estate.

False. Montana law provides that a surviving spouse may claim a share of revocable trust assets.

6. Living trusts avoid the expense of a guardianship.

Misleading. While a living trust may avoid the expense of a guardianship in case of your future incapacity, a durable power of attorney is a simpler and less costly alternative to achieve the same goal.

7. Attorneys charge from 3 percent to 10 percent or more to probate your estate.

False. If your family wishes to hire the services of an attorney to assist with a probate, your family may agree upon a reasonable attorney fee. That fee may be based upon an hourly charge or upon a percentage of your estate. Recent surveys by the University of Montana indicate that an average fee, if measured by a percentage, is less than three percent of the estate.

8. Probate takes years to complete.

Misleading and Very Unlikely. There are rare circumstances where families and others clash for an extended period after a death. Such disputes can cause delays in the administration of either a probate or a living trust. In other circumstances, disputes with the Internal Revenue Service can cause delays. However,

in most circumstances the administration of a living trust is no more time efficient than the administration of a will in probate.

9. Probate requires court hearings.

False. Montana has adopted a simplified probate process under the Uniform Probate Code. These informal procedures, which account for more than 95 percent of Montana probates, involve no court hearing.

Unfortunately, only 14 states have adopted the Uniform Probate Code. Thus, some of the criticisms of cost and delay are because of the probate procedures of other states, not the state of Montana.

10. Everyone should have a living trust.

False. The costs of creating and administering living trusts outweigh their benefits for most Montanans.

For a few Montanans, the living trust is a useful device to obtain asset management. These individuals lack the capacity to manage their assets, or have lost that ability through ill health. They name family members or corporate trustees (typically, banks) to provide administration through a living trust.

For a few other Montanans who own out-of-state real estate, the living trust can be a useful tool to avoid that state's probate process.

11. The living trust is the only way to avoid probate.

False. If your goal is to avoid probate, there are several ways to do so. Joint tenancy with rights of survivorship, multiple party accounts with financial institutions, and transfer on death (TOD) designations of securities are common and inexpensive methods of avoiding probate.

How Older People Become Victims of LIVING TRUST SCAMS

Con artists make false and misleading statements to older people through:

1. **telemarketing and mail solicitations,**
2. **door-to-door sales,**
3. **“free” seminars and workshops, and**
4. **advertisements.**

Often, con artists attempt to meet in your home through offers of a free living will, a free power of attorney, or a free “estate analysis.” Many also offer unnecessary partnerships, limited partnerships, “family” partnerships, and limited liability companies.



WHAT YOU CAN DO TO PROTECT YOURSELF

It is very difficult to get your money back if you are cheated in a living trust scam. So before you buy, and better yet, before you allow a salesperson in your home, remember:

1. Always take sufficient time to make your decision.
 - Legitimate advisers understand when you want more information about their offer or their company.
 - Be sure to talk with someone knowledgeable whose advice you value when considering a trust. Contact your accountant, estate planning attorney, banker, or financial adviser.
 - Never respond to an offer you don't thoroughly understand.
 - Avoid buying on impulse or succumbing to sales pressure to “act now.”
2. If you conclude that a trust may be right for you, deal directly with a licensed Montana attorney who has substantial expertise in estate planning.
 - Be sure you're working with someone with the necessary training and education.
 - If a trust is right for you, it should be drafted by someone with knowledge of Montana law. Also, the trust will generally cost less than the prices charged by trust salespersons.
 - If you have the misfortune of selecting an attorney who makes a mistake, you may be able to recover for the attorney's malpractice.

TESTIMONY IN SUPPORT OF SENATE BILL NO. 79 AS AMENDED

I am Tom Ellis, President of Norwest Bank Helena. On January 17th, our bank completed its 99th year of exercising Trust powers and providing Trust services to over 3,000 Montana residents who have entrusted almost two billion dollars to us.

Trust accounts can be very valuable and if utilized properly, often provide additional financial security to those creating the trust as well as potential downstream beneficiaries. A considerable amount of federal law as well as Montana state law as been developed to both protect trustors and beneficiaries and provide a means by which trustees can carry out their duties and responsibilities in an efficient, safe manner in the sole interest of the beneficiaries.

No two individuals share the exact same objectives/goals, have the same needs or desire the same level of discretion over their assets and for that reason, none of the 3,000 accounts we administer are exactly alike. Each Trust account is governed according to a Trust Agreement which has been prepared by a legal professional who has tailored that agreement to meet the objectives and goals of that individual trustor, taking into account unforeseen life events that could occur in the future. It is for this reason the Trust area of commercial banking is perhaps the most scrutinized by regulators of any area. Not only do we operate in accordance with various banking laws, but we must also operate in accordance with all of the Trust laws and subject at all times to the governing Trust instrument. At least annually, regulators review not only the staff that administers Trust accounts, but all of the procedures, standards and administrative policies developed to administer those accounts. The individual Trust officers are also scrutinized in terms of their education, continuing education, financial stability and general experience in managing Trust accounts.

Bankers and Trust officers are regulated and receive oversight for the sale and administration of financial services. Insurance sales people are licensed and receive oversight, real estate sales people are licensed and receive oversight, stock and bond brokers are subject to oversight, even contractors, electricians and plumbers are subject to oversight, and so should those who sell living Trust accounts. Many very vulnerable individuals often do not understand the meaning of transferring their assets to a Trust and many trustees do not fully understand the duties and responsibilities they must carry out in the administration of a Trust. Far too often we have seen in the deposit or loan side of the bank very inappropriate situations develop because someone is trying to use a very standardized Trust agreement for someone who does not understand what this truly means, or whose needs do not necessarily fit that standardized document. Citizens of Montana should at least have some place to lodge complaints.

Thank you very much for allowing me to testify this morning.

AMEND SENATE BILL NO. 79, Introduced Bill;

Page 2, following line 7 add the following new subsection:

"(3) Subsection (1) does not apply to the preparation, acceptance or discussion of a living trust by an employee of a state or national bank with trust powers, where the trusts are prepared for an individual client and where preparation of the living trust is based upon the client's particular financial circumstances."

Renumber the following subparagraphs

INTENT OF AMENDMENT:

State banks with trust powers are chartered under state law and regulated by the state, and national banks with trust powers are chartered under federal law and regulated by the federal government, and therefore proper regulation is already in place.

Lawyers are also regulated by the Supreme Court, so the exemption parallels the exemption for lawyers in Subparagraph (1).

WINTER 1993/94

ALERT

A Special Bulletin for Complaint-Handlers

Living Trust or Living Nightmare?

The following script and similar scenarios have become all-too-familiar in recent months:

A retired couple in Maine received a postcard from the American Association for Senior Citizens (AASC),¹ offering information on estate planning, particularly how to avoid the delays and high costs associated with having to probate a will. The couple mailed in a detachable portion of the card seeking more information, and shortly thereafter a sales representative contacted them, set up an appointment, and came to their home.



Produced by the
 American Association of
 Retired Persons, in
 cooperation with the
 National Association of
 Attorneys General.
 Prepared by the National
 Consumer Law Center

¹ This description is based on allegations made by the states of Maine and Washington in their lawsuits against the American Association for Senior Citizens, filed April 14, and August 6, 1992, respectively, and on statements made in affidavits filed with the complaints.

During the visit, the representative described the benefits of joining AASC, including a discount merchandise catalogue, discount prescriptions, and membership in a prepaid legal plan. The services provided by the prepaid legal plan included the preparation of a living trust. The salesman gave the couple a sheet that listed the costs of several estate planning options. Based on the salesman's estimate that the couple's estate was worth approximately \$240,000, he told them it would cost them at least \$24,000 to probate their estate if they did "nothing" with respect to estate planning. The sales representative also stated that a private attorney would charge them approximately \$10,000 to draw up a living trust, pour-over wills, powers of attorney, and to settle their estates. Finally, the sales representative presented a third option — join AASC, the cost of which ranged from \$2,295 for an estate worth up to \$200,000, to \$6,895 for estates worth more than \$1 million; after the first year of membership, the couple would have to pay \$30 per month to maintain their membership.

The salesman gave the couple a pamphlet that emphasized the high cost, complexity, and delays associated with probate. After repeated calls from the salesman, the couple gave him a check for the first year's membership. In exchange for the names of five retired friends who owned property, he offered them a certificate for \$250 in discounts on products for sale in a catalogue sent to AASC members; they never received the certificate. The couple never received a written contract from AASC, only an "official receipt," which did not contain AASC's address and did not inform the couple of their right to cancel the contract within three days. One month later, the couple received a living trust and "pour-over" wills in each of their names.

The couple had several questions about the documents, and telephoned an Arizona attorney whose name was printed on the form document. Dissatisfied with his response, they called the original sales representative to cancel their membership; he told them that this was impossible. One week later, the couple finally received a contract from "Prepaid Legal Services, Inc.," AASC's Oklahoma-based "legal service document service."²

This couple's experience is by no means unique. A number of groups around the country have been aggressively marketing living trusts to older Americans. Salespeople approach potential customers with slick materials full of seemingly useful information about a simple, inexpensive way to save thousands in taxes and probate, allowing them to leave a larger inheritance for their loved ones. An explicit message is given, or at least an implicit impression is

left, that the offer is a once in a lifetime opportunity that will soon expire, often the same day! For example, Charles Barnard, Travel Editor of AARP's *Modern Maturity*, wrote that an AASC representative told him that his name would be deleted from the company's computer if he did not apply for membership the day the representative was in his home.³

Rather than offering objective information that would help a consumer decide if a living trust is appropriate to meet his or her particular needs and goals, many of these companies use scare tactics, gross misrepresentations, and high pressure sales techniques to convince unsuspecting elders to purchase products and services of questionable value and uncertain savings, all at inflated prices.

A new breed of scam artist has thus begun to prey on the older American's concern about protecting his or her assets after death. This newsletter describes common

² See complaint filed in *Illinois v. American Ass'n for Senior Citizens*, No. 92 MR 269 (Ill. Cir. Ct. filed 9/23/92), at p. 9.

³ See AARP's *Bulletin*, Vol. 33, No. 4, April 1992, p. 1.



sales schemes and some of the leading actors. It also presents information to help older Americans and advocates evaluate the range of estate planning choices.

Wills & Living Trusts — What's the Difference?⁴

Today, estate planning includes many alternatives to a simple will, which once was the usual choice. Older people, in particular, are being urged to consider a host of options, through mail solicitations, television advertisements, news articles, and door-to-door sales. Often hyped among these choices are living trusts, also known as irrevocable or revocable living trusts, or "inter vivos" trusts. Promotional materials often mention the advisability of having a living will, as well.⁵ Basic explanations of wills and trusts will help readers better understand the rash of recent "trust" scams.

A *WILL* is a legal document in which an individual gives directions about how his or her property should be distributed after death. It does not take effect until the death of the person who executed it (the "testator" or "testatrix"). The will names a personal representative, usually called an "executor," an individual or institution responsible for making sure that the property is



distributed to named beneficiaries. Depending on the type of property, its value, and state law, the will may have to be "proved" in a court process, called "probate." (Some types of property, such as life insurance and pension benefits, are not subject to the probate process and pass directly to the named beneficiaries.) Various costs are associated with probate, including filing fees, personal representatives' fees, and attorneys' fees. These expenses are deducted from the value of the property that otherwise would be distributed to beneficiaries. Moreover, property cannot be distributed until probate is completed, which often takes a year or more.

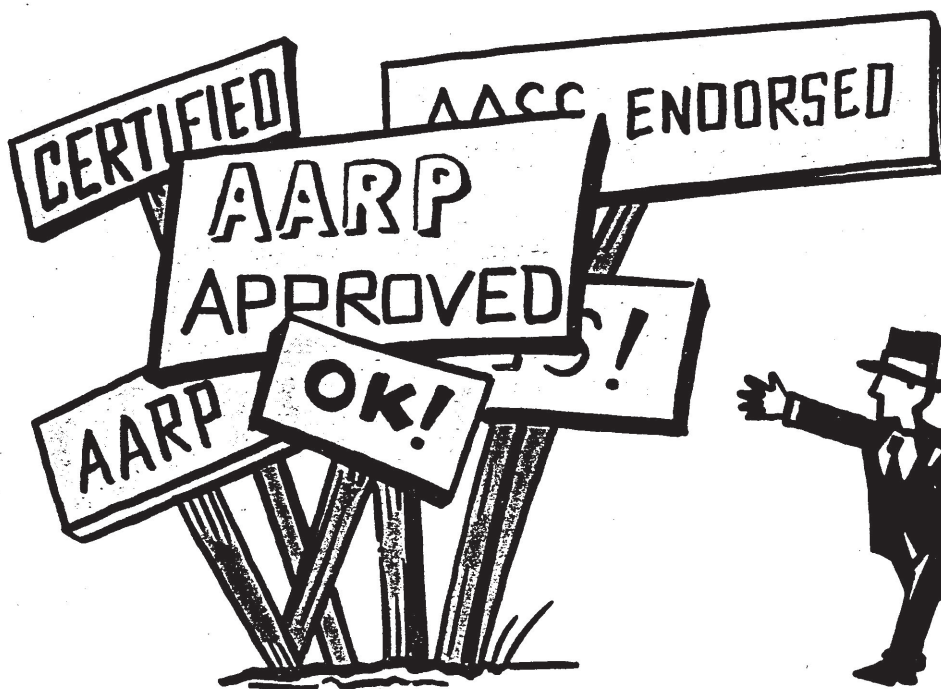
By contrast, a *LIVING TRUST* is a legal estate planning document that takes effect during a person's lifetime. The person who creates the trust — the "settlor," "grantor," or "creator" — transfers property to the trust and names a "trustee" who manages the property during the settlor's lifetime. If the trust is revocable, the settlor can change its terms and even revoke it, as long as he or she remains legally competent. The settlor often

appoints himself or herself as the trustee, but is free to appoint someone else. If the settlor acts as trustee, he or she also names a backup or successor trustee to distribute the trust property after the settlor's death. This is similar to what the personal representative, described above, does under a will; however, a trust generally does not go through the probate process. If the trustee is a "volunteer" — a family member or friend of the settlor — there is relatively little expense involved in a living trust, apart from the costs to draft the necessary documents, change title to property, and make future property transfers. If a "professional" trustee is named, the costs are greater and, as will be illustrated, in some cases are extraordinary!

With this basic information about these very different documents, the remainder of this newsletter will focus on the schemes involving living trusts and the actions taken to regulate their marketing and to halt the obvious scams. Also included are tips on how to make sound estate planning decisions.

⁴ Much of the explanatory material in this section is taken from the consumer booklet, "Living Trusts and Wills" (AARP Product Report, Dec. 1991; stock # D14535). Readers seeking more detailed information can obtain this free publication from AARP Fulfillment, 601 E St., N.W., Washington, D.C. 20049.

⁵ A living will serves a completely different purpose, and it is not discussed in this newsletter. In a living will, people state their wishes about the medical care they do and do not want administered in the event of a terminal illness or permanent vegetative state when they are legally incompetent to make and communicate binding decisions. A living will can be a useful tool to avoid the appointment of a guardian for medical decisions, but it is completely unrelated to the transfer of property at death.



The Key Players — AASC & Its Relatives

It is no coincidence that some sellers of living trusts have, as an initial marketing ploy to gain a consumer's trust, taken names that are easily confused with organizations such as the American Association of Retired Persons (AARP). AARP does *not* sell or endorse any living trust product, and does not work cooperatively with any company that promotes or sells such documents.

The American Association for Senior Citizens (AASC) is a prime example of this type of company. Consumers repeatedly have complained that this and other companies actually have implied that they are related to AARP. In a common opening pitch, the salesperson asks if the potential customer is a member of AARP, or if he or she read about the company in *Modern Maturity* magazine (which, in its August-September 1991 issue, ran an article about the pros and cons of living trusts — but did *not* endorse any company or product.⁶)

In its suit against AASC, the State of Washington alleged that

AASC "represent[s], directly or by implication, that AASC is approved by, an affiliate of, or is associated with the American Association of Retired Persons (AARP)."⁷ Bolder still, according to a complaint filed by the Maine Attorney General against AASC, a telemarketer calls seniors stating that "there are AARP . . . representatives in the area who want to help its members with a living trust and asks if the senior citizen would like to receive more information from an AARP representative."⁸ As the complaint states, "AARP is not associated with AASC and has, in fact, issued bulletins to its members warning of the tactics employed by Defendant's salesmen."⁹

AARP and the Attorneys General of various states have received numerous complaints about living trust schemes. This newsletter addresses several representative companies, their sales practices, and legal actions known to have

been taken against them. Readers who want more complete information can contact the National Association of Attorneys General (NAAG).¹⁰

(1) American Association for Senior Citizens (AASC):

According to Evan Karnes II, a Chicago attorney for a former AASC officer, AASC closed its doors at the end of July or the beginning of August 1992, and has not conducted business of any kind since then.¹¹ We nevertheless describe its practices to illustrate the scope of the problem. Moreover, consumers have complained that other companies are using the same tactics.¹²

¹⁰ Please contact: Emmitt Carlton, NAAG, 444 N. Capitol St., N.W., Washington, D.C. 20001, (202) 434-8016, or Jack Norris, NAAG Elderly and the Law Subcommittee, 4000 Hollywood Blvd., Suite 505-S, Hollywood, FL 33021, (305) 985-4780.

¹¹ Telephone conversation on 9/24/93 between Mr. Karnes and Deborah Zuckerman, Staff Attorney, AARP Consumer Affairs.

¹² Furthermore, Attorneys General in some states still have cases pending against AASC. In addition, Pre-Paid Legal Services, Inc., through which AASC promised "Free Legal Services for Preparation of a Revocable Living Trust by a Qualified Attorney," and other legal services, lives on.

⁶ For a first-hand account of such a sales pitch, see AARP's *Bulletin*, *supra* note 3.

⁷ See *Washington v. American Ass'n for Senior Citizens*, No. 92203442-0 (complaint filed 8/6/92), at p. 6.

⁸ See *Maine v. American Ass'n for Senior Citizens*, complaint filed 4/14/92, at p. 4.

⁹ *Id.* at 5.

AASC's membership materials described it as a "Nationwide Non-Profit Organization" located in Washington, DC. A membership letter stated that AASC was "entrusted with getting the message to" older people, so that they "can receive every benefit and advantage to make sure the dollars [they] have spent a lifetime earning and saving will pass on to [their] heirs as intact as Uncle Sam will allow." With this responsibility as its "driving force," the letter goes on to state that the "Association explored every conceivable avenue available before making the decision to educate our membership on the value and importance of REVOCABLE LIVING TRUSTS." Finally, the letter indicates that AASC is committed to a "PRE-PAID LEGAL benefit that actually pays the legal fees for your REVOCABLE LIVING TRUST."

An AASC advertisement placed in a Poughkeepsie, NY, newspaper, to recruit sales representatives, gives a flavor for its operating philosophy: "American Association for Senior Citizens . . . Find a huge, recession-proof market & fill a need. Well, we found it, we built it and they're coming. Our top reps average over \$2000 comm. per week. Our managers are ridiculously overpaid. In short, a closer's 'field of dreams.'" Unusual language for a "non-profit" group!

The anecdote at the beginning of this newsletter gives a clear picture of AASC's sales tactics:

- written materials and sales representatives grossly exaggerated the costs of probating a will;
- out-of-state attorneys, who often were not licensed in the customer's state and may not have been familiar with the applicable state law, prepared living trust documents;

- consumers approached door-to-door were not notified of their right to cancel the contract;¹³ and
- the cost of preparing the trust far exceeded the rate that a local attorney would have charged to draft a similar living trust document.

(2) American Association for Retired Citizens (AARC):

The Illinois Attorney General's Office obtained a January 21, 1992 memorandum addressed to "Illinois Insurance Agents," and accompanying materials, entitled "The AARC Opportunity." In addition to stating how a living trust can benefit consumers, AARC's written materials illustrate a potential problem for consumers: in providing sales representatives (in this case insurance agents) with the information necessary for a living trust, the consumer also is revealing information that the salesperson can

use to sell other products, such as life insurance and annuities.

The materials provided by the Attorney General's Office described AARC as "a national organization dedicated to enabling retired and senior citizens to pass the greatest amount of their estate to their heirs as effectively, as quickly, as prudently and as intact as possible."¹⁴ The memo stated that revocable living trusts "will save your clients thousands of dollars in probate and attorney fees."¹⁵ Perhaps more importantly, however, AARC's materials stressed how its sales representatives can share the spoils. AARC noted that "Americans 65 years and older represent the fastest growing segment of the population . . . [and] have more discretionary income available to spend than any other age group."¹⁶

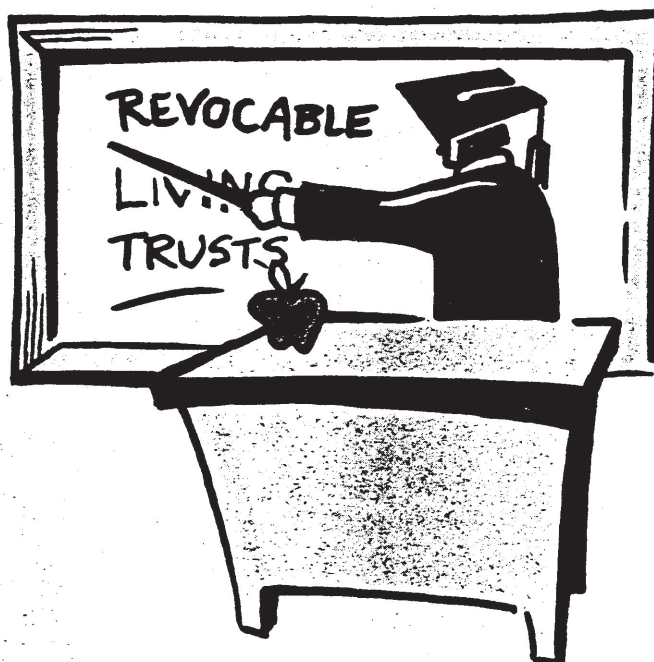
While AARC's memo noted the "great degree of personal and professional satisfaction realized from providing a high quality, cost saving, unique, and valuable

¹³ Where the sale is door-to-door, state and federal Home Solicitation Sales Acts, which allow a 3-day cooling off period, will apply. See generally 16 C.F.R. § 429 (FTC) and National Consumer Law Center (NCLC), *Unfair and Deceptive Acts and Practices* § 5.8.2 (3d ed. 1991 and Supp. 1992). NCLC's publication discusses the FTC and state rules.

¹⁴ All quotations are from AARC's 1/21/92 memo to insurance agents and accompanying AARC materials.

¹⁵ *Id.*

¹⁶ *Id.*



service," this reward was in addition to the "obvious financial benefits you derive from marketing a benefit package which includes Living Trust Preparation."¹⁷ That statement was relatively mild, however, compared with AARC's other "hooks." For example, the memo stated that the benefit of living trust preparation "typically attracts the aggressive Insurance Professional to our opportunity," and that the revocable living trust not only is "rapidly becoming the pre-eminent tool for modern day estate planning, it is also the newest 'success formula' for annuity and senior market agencies to generate additional sales with existing, as well as new, clients."¹⁸ Finally, the memo to insurance agents stated that a living trust applicant "must expose the location of every asset dollar in their portfolio. This creates an invaluable opportunity for asset redistribution and annuity sales!"¹⁹ (All emphases in

original memo.) Thus, as prospective sales representatives learn more about living trusts, they will better appreciate the value to their clients, and can "watch [their] insurance business prosper!"²⁰

Given AARC's marketing to potential sales representatives, it is not surprising that complaints have surfaced about the company's tactics and services. The Illinois Attorney General's office conducted an investigation, and now indicates that AARC is not doing business in that state. A New York State Police officer called AARP to report a complaint from a man who had attended an AARC seminar for potential sales representatives in Newburgh, NY. The seminar participant indicated that attendees were advised not to "leave [a prospect's home] until you have a check for \$3,000," and all the financial information necessary for a living trust. The participant also reported that trainees were told to bring a copy of AARP's magazine, *Modern Maturity*, to gain legitimacy with prospective customers.

The State of Missouri recently sued AARC and Caldwell Legal, U.S.A., the company through which AARC told customers they would receive pre-paid legal services.²¹ In seeking preliminary and permanent injunctions, the state alleged that AARC sold memberships to Missouri residents for amounts exceeding \$1,000, and "represented to consumers that membership with AARC would entitle consumers to benefits including . . . [a] revocable living trust prepared by a qualified attorney in your state of residence."²² In fact, the state charges that AARC ordered living trust documents from Caldwell Legal, a California corporation, that "[n]o attorneys licensed to practice law in Missouri, or qualified in Missouri, assembled, drafted, or prepared the revocable living trusts or the other legal documents," and that "[d]efendants did not advise the consumers prior to sale that no Missouri attorneys were actually involved in the preparation of the documents."²³

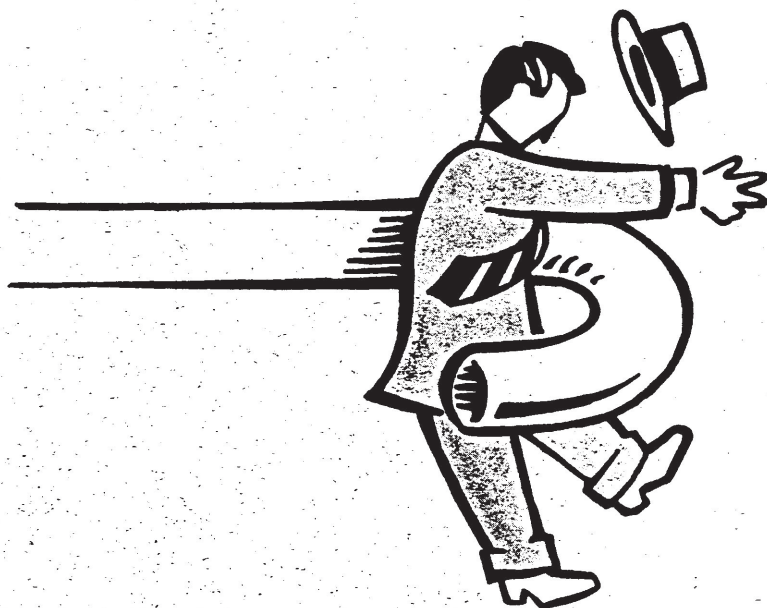
The suit further alleges that the defendants "misled consumers into believing that they were qualified and authorized to select, design, prepare and fully complete an estate plan, including legal documents tailored to the unique needs and desires of particular consumers."²⁴ Moreover, the defendants "failed to disclose in a meaningful way that professional advice should be sought prior to purchasing the membership in order to obtain the revocable living trust package sold by Defen-

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*



²¹ *Missouri v. American Capital, Inc., d/b/a American Ass'n for Retired Citizens*, No. 93CC052376 (Mo. Cir. Ct. Boone County; complaint filed June 29, 1993).

²² *Id.* at 6.

²³ *Id.* at 8.

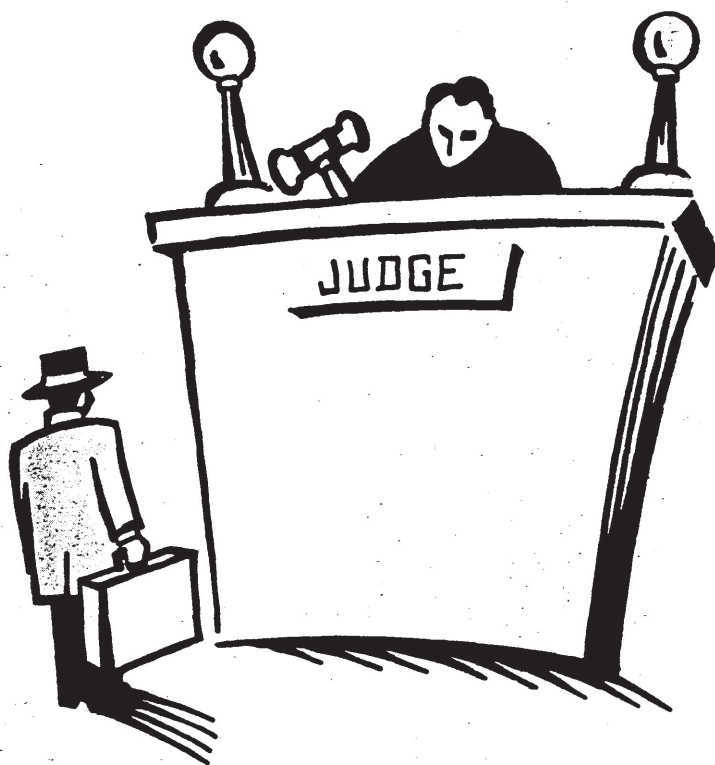
²⁴ *Id.* at 9.

dants."²⁵ Finally, the state charged that the defendants: misrepresented the costs of probate in Missouri; did not accurately compare the cost of a living trust to the amount a consumer could expect probate to cost; erroneously gave the impression that a living trust can decrease inheritance taxes; misrepresented the need for a living trust to reduce estate taxes; misrepresented the "agonies of probate and exaggerate[d] the merits of a living trust"; failed to reveal the potential drawbacks of living trusts; and gave "the impression that a living trust is the superior estate planning tool for all or most consumers regardless of the individual needs, desires or circumstances of a particular consumer."²⁶

In addition to charging the defendants with fraud, deception, and unfair practices, the state also alleges that they engaged in the practice of law without a license. The state asked for various relief, including an injunction to prevent the defendants and its agents from selling revocable living trusts to Missouri consumers; full restitution for all consumers who have been aggrieved by their purchases from the defendants; and a civil penalty of \$1,000 per violation of the state statute regulating the practice of law.

(3) Other Companies & Individuals:

Complaints by older consumers also led to lawsuits against other companies and individuals in connection with the marketing and sale of living trusts, including: Beneficial Living Trust/Beneficial Estate Planners²⁷; attorney William



D. Baker (Iowa);²⁸ Royce D. Hanna, a/k/a Royce Hanna & Assocs. (Kansas);²⁹ and Mid-America Living Trust (Wisconsin).³⁰

As mentioned above with regard to AASC, consumers have complained that companies have misrepresented their connection to AARP. For example, The Senior Citizens Advisory Department, American Wills & Planning Inc., addressed its solicitation piece to "Senior Citizens Home Owners; AARP members." Moreover, the solicitation urged people to return a pre-paid postcard to find out if they "qualify" for a living trust. Another company was charged with misrepresenting to consumers that creditors cannot

make a claim against assets placed in a living trust, that people who place their assets in a living trust would not need to spend their assets if they enter a nursing home, and that no death taxes need to be paid if a living trust is purchased.³¹

Costs — Living Trusts vs. Wills

Sales representatives also frequently exaggerate the costs associated with wills and the probate process, leading potential customers to believe that living trusts are a much more economical choice. In general, an attorney will charge several hundred dollars more to draft a living trust than to draw up a will. A more accurate comparison, however, should include all the costs associated with a living trust versus those associated with drafting a will plus probate.

Depending on the state, a living trust may, in fact, be less expensive than a will plus probate. However

²⁵ *Id.* at 9-10.

²⁶ *Id.* at 10-11.

²⁷ See *Iowa v. Robert Christensen & Daniel Johnson, individually and d/b/a Beneficial Living Trust*, No. 28723 (filed Iowa Dist. Ct. Apr. 6, 1992).

²⁸ *The Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Baker*, 492 N.W.2d 695 (Iowa Sup. Ct. 1992).

²⁹ *Kansas v. Royce D. Hanna, d/b/a Royce Hanna & Assocs.*, No. 92-CV-12 (Kan. Dist. Ct. complaint & motion for preliminary injunction filed May 1, 1992).

³⁰ See *Wisconsin v. Mid-America Living Trust, Inc.*, No. 91CV730 (Wis. Cir. Ct. Walworth County; complaint filed Dec. 2, 1991).

³¹ *Id.*

the boilerplate trusts being marketed by many unscrupulous companies cost much more than living trusts drawn up by an attorney according to an individual's specific needs. Moreover, the cost quoted for the trust is for the document itself, and does not include costs associated with transferring property into the trust or managing trust property. AARP, in the booklet "Living Trusts and Wills" (see footnote 4), compiled average comparative costs for living trusts in San Diego, CA; Milwaukee, WI; and Wilmington, DE. The results (see BOX, below), show that an individual with a modest estate generally would save more than \$1,000 by having an attorney draft a living trust as opposed to a will plus probate; a couple would save slightly less. Moreover, even the most expensive living trust figure illustrated — \$1,850 for a Wilmington couple (who in some cases might spend as little as \$250 for a trust drafted by a reputable attorney) — is significantly less

than the "assembly-line" trusts currently being marketed for as much as \$3,000, plus a common monthly "maintenance fee"!

Fighting Back Against Peddlers of Misleading Living Trusts

Due to the high number of complaints, and the actual and potential injury to older Americans, numerous state Attorneys General have focused their attention on the problems posed by living trust scams. To coordinate their efforts, consumer protection advocates from at least 25 states, in attendance at the Spring 1992 National Association of Attorneys General Consumer Protection Seminar, formed an informal Living Trust Task Force. Task force members exchange documents and participate in conference calls to develop strategies and to share information about specific scams and experiences trying to stop them. The task force works with AARP's Con-

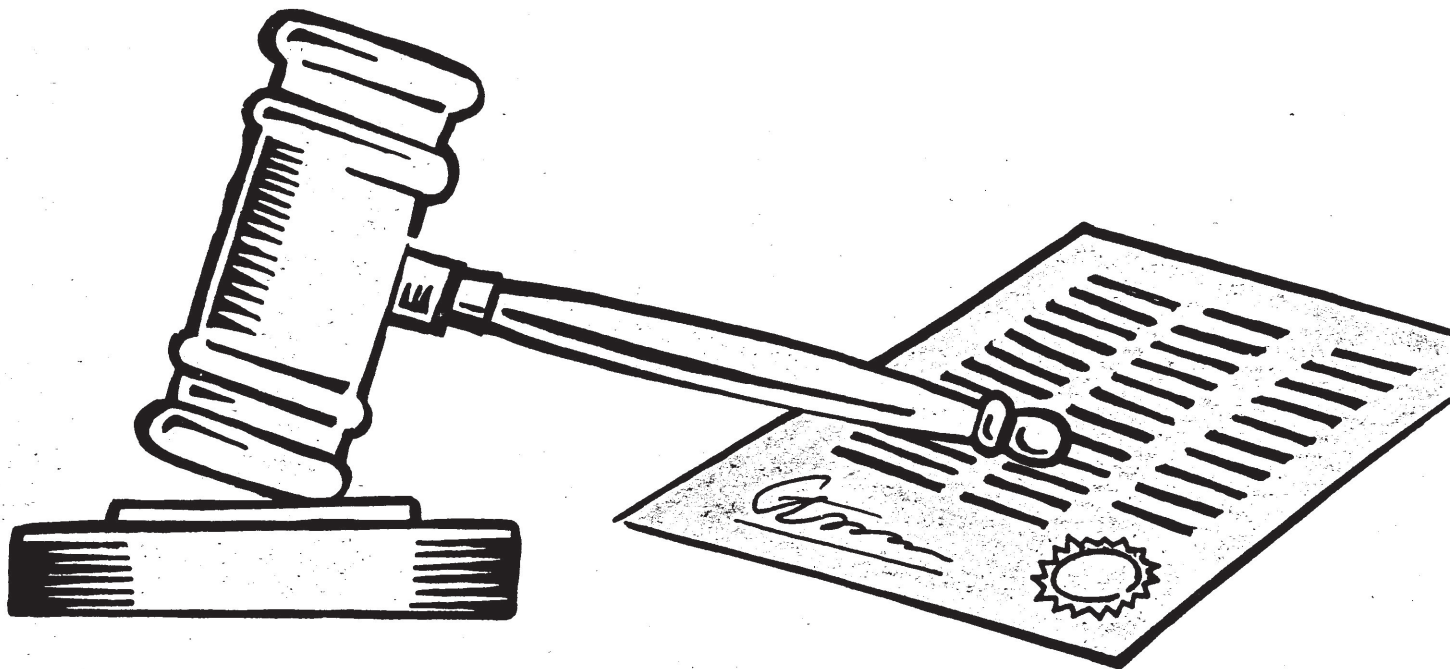
sumer Affairs Section and the American Bar Association's Commission on Legal Problems of the Elderly, to allow the widest possible dissemination of consumer education materials. In addition, in September 1992, several Attorneys General and AARP testified before the U.S. Senate Special Committee on Aging which was looking into living trust scams and other fraud perpetrated against older persons. AARP urged that a comprehensive national enforcement campaign be undertaken, to operate in cooperation with state consumer protection officials.

Suits against companies and individuals selling living trusts have been brought on several different bases. These include: actions under state Uniform Deceptive Acts and Practices (UDAP) laws; fraud or misrepresentation actions; and violations of door-to-door sales statutes (based on the failure to inform customers that they have three days to cancel the contract). State bar associations have also brought actions, alleging that the marketing and sale of living trusts by corporations and non-attorneys constitutes the unauthorized practice of law.

Several legal actions already have borne fruit. As mentioned earlier, AASC has ceased operation. According to the New York Attorney General's office, a multistate task force of 21 Attorneys General is currently investigating Prepaid Legal Services, Inc., the company that AASC used to draft trust documents. The task force is trying to get refunds for AASC customers.

In Iowa, the Attorney General's office and the Commission on the Unlicensed Practice of Law brought related actions against Beneficial Living Trust and Beneficial Estate Planners. A consent injunction was entered against Beneficial in both cases and, according to the Attorney General's Office, the state was able

Price Range of Will and Probate for 77-Year-Old with \$80,000			
	San Diego	Milwaukee	Wilmington, DE
Low	\$ 1848	\$ 1580	\$ 1428
Average	1971	1654	1501
High	2298	1805	1758
Cost of Living Trust for 72-Year-Old with \$80,000			
	San Diego	Milwaukee	Wilmington, DE
Low	\$ 300	\$ 300	\$ 150
Average	598	540	350
High	850	1000	600
Price Range of Living Trust for Couple with \$150,000 Home and \$50,000 in Stocks			
	San Diego	Milwaukee	Wilmington, DE
Low	\$ 495	\$ 350	\$ 250
Average	956	795	565
High	1600	1500	1850



to obtain restitution for all the people who had been harmed by the company's actions.³²

In October 1992, the Attorney General of Washington filed an assurance in county court in which The Estate Plan of California and its president agreed not to use deceptive tactics in marketing and selling living trusts to Washington consumers.³³ The court order stemmed from an investigation into allegations that the firm's representatives engaged in the unauthorized practice of law and made misrepresentations about Washington's probate system. The company admitted no wrongdoing by signing the assurance, but agreed to arrange for consumers to confer with an attorney licensed to practice in Washington if they are seriously considering buying a living trust from the company. The company also agreed to tailor its sales presentation to accurately reflect Washington's probate system, and paid the state \$14,500 to offset its investigation costs.

³² See note 27, *supra*; injunction entered by consent order May 6, 1992.

³³ *In re The Estate Plan*, No. 92 2 101594 (assurance filed Oct. 15, 1992, Wash. Super. Ct. Pierce County).

Other states also have brought successful actions against companies and individuals that sell living trusts. For example, Kansas obtained a consent judgment³⁴ based on allegations that a sole proprietor did not have the authority to provide the advice and service he gave in connection with the solicitation and sale of living trusts; that the individual knew or had reason to know that the price for the living trust package he sold was far in excess of the price at which similar services were readily available; and that the packages sold were not personalized for clients. A Kansas district court enjoined the defendant from engaging in the unauthorized practice of law, i.e., of "conferring with consumers regarding matters requiring the knowledge and application of legal principles and techniques," and from preparing documents that confer legal rights. The defendant agreed to cease engaging in all the allegedly deceptive and unconscionable acts, and to pay \$1,000 in investigation fees to the

³⁴ *Kansas v. Royce D. Hanna, d/b/a Royce Hanna & Assocs.*, No. 92-CV-12 (Kan. Dist. Ct. Aug. 31, 1992).

Attorney General, \$27,500 in civil penalties to the state, and specified amounts on behalf of consumers according to their actual damages. According to the Attorney General's Office, the defendant disappeared after the judgment was entered, and the litigation division of the Attorney General's office is pursuing the collection aspect of the matter.

In Wisconsin, the state Department of Justice obtained and collected a \$7,400 civil judgment against Mid-America Living Trust and its president, Robert Dillie.³⁵ The state also got an injunction to prevent Mid-America from making misrepresentations in connection with its sale of living trusts. Specifically, the court enjoined the defendants from making the following false statements: creditors cannot make claims against assets placed in such a trust; customers would not have to spend their assets if they had to enter a nursing home; and customers would not have to pay death taxes. The court also enjoined the defendants from failing to provide Wisconsin

³⁵ *Wisconsin v. Mid-America Living Trust, Inc.*, No. 91CV730 (Wis. Cir. Ct. May 27, 1992).

consumers with two copies of a notice of their right to cancel the transaction in accordance with state law.

At least three states have directly addressed whether the sale and preparation of living trust documents by non-attorneys constitutes the unauthorized practice of law. The Florida Supreme Court issued a three-part ruling concerning what does and does not constitute the practice of law.³⁶ First, assembling, drafting and executing a living trust document, and funding the trust, constitute the practice of law. Also, a lawyer must determine the client's need for a living trust and must identify the type of living trust most appropriate for the particular client. Second, merely collecting the information necessary for the living trust does not constitute the practice of law, and nonlawyers thus may properly perform this activity. Third, the court stated that "[i]f the lawyer is employed by the corporation selling the living

trust rather than by the client, then the lawyer's duty of loyalty to the client could be compromised." Thus, the lawyer who "assembles, reviews, executes, and funds a living trust document should be an independent counsel paid by the client and representing the client's interests alone." According to a representative of the Florida Bar, there currently is an investigation into complaints that the American Senior Citizens Alliance is engaged in the unlicensed practice of law with regard to the sale of living trusts.

In Iowa, the Supreme Court reprimanded an attorney who had accepted referrals from a certified financial planner and a bank trust officer for the purpose of preparing living trusts.³⁷ The financial planner, not the attorney, approved the use of particular "legal instruments by which legal rights of others are either obtained, secured or transferred," and thus exercised the professional judgment that constituted the practice of

law. The attorney aided the financial planner's unauthorized practice of law by allowing the financial planner to exercise the professional judgment that the lawyer should have exercised, by allowing the financial planner to act in a confidential capacity with clients who later were referred to the lawyer, and by accepting approximately 100 referrals from the financial planner.³⁸ The court also found that the lawyer had a conflict of interest, by allowing the financial planner to influence his professional judgment in providing legal services to referred clients. The financial planner, not the lawyer, decided on the appropriateness of a living trust and the particular documents necessary to effectuate it, and the attorney allowed the financial planner to "direct or regulate his professional judgment," as well as to "dilute [his] loyalty to his client[s]."

Finally, on August 11, 1993, the Governor of Illinois signed Public Law 88-305 which amends the Consumer Fraud and Deceptive Business Practices Act by making the "assembly, drafting, execution, and funding of a living trust by a corporation or a nonlawyer . . . an unlawful practice." The law goes into effect on January 1, 1994, making first offenses punishable as a misdemeanor, with subsequent offenses punishable as a felony.

How to Avoid Being Taken

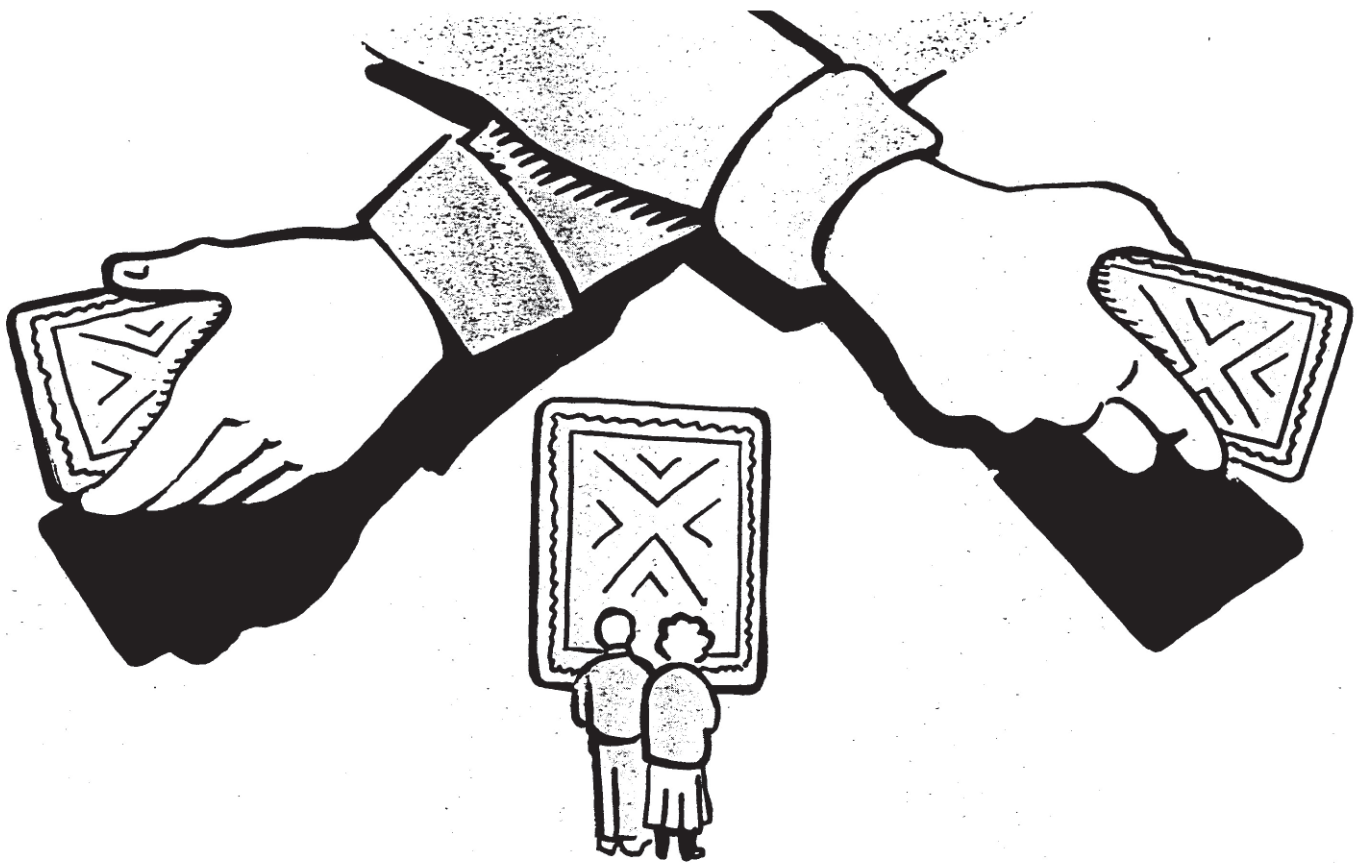
As in many other situations, it appears that the best way to protect against a living trust scam is to become informed about the product and its proponents. A revocable living trust may be an excellent estate planning tool for a

³⁶ *The Florida Bar re Advisory Opinion — Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. Sup. Ct. 1992).

³⁷ *The Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Baker*, 492 N.W.2d 695 (Iowa Sup. Ct. 1992).

³⁸ The court notes that living trusts "may be a very poor substitute for probate. Unlike probate fees, the fees charged by nonlawyers like [the financial planner] who tout living trusts are not subject to court scrutiny. Lack of court scrutiny can easily lead to unnecessary and excessive fees."





particular older American. But, even where this is true, there are many alternatives to the high-priced, high-pressure companies described in this newsletter. Before committing any time or money, or giving any signed documents to someone actively selling living trusts or "prepaid legal services," individuals should carefully review the amount and type of their assets, as well as their wishes regarding the distribution of these assets after death. They also should be able to answer the following questions:

- What is the *real* cost of a local attorney drafting a will or living trust?
- What is the *real* cost of probating a will in their state?³⁹
- How much will it cost to transfer the title to property into a living trust? Who will handle future transfers?
- Does the person selling services

claim to have a connection with AARP? If so, the company should be avoided and reported immediately to AARP Consumer Affairs, and the local consumer protection agency or Attorney General's office.

- Will an independent attorney who is licensed to practice law in the customer's state and who has experience in estate planning actually advise the customer on the appropriateness of a living trust in his or her circumstances, counsel on its contents, and draft and execute the necessary documents?
- Is the sales representative trying to sell a "package" or "kit" of services? In other words, will the documents be individualized according to the consumer's assets, planning needs, etc.? Estate planning is a highly individualized and legally complicated procedure, and no "package" or "kit" filled out after a single interview with a sales representative can provide satisfactory documents. In fact, the form documents sold by an out-of-state company may not even satisfy

the state's legal requirements for a valid trust document.

- Does the company charge fees beyond the cost of drafting the trust documents? Consumers should be suspicious if there is a monthly "maintenance" fee for updated information or related services.
- Does the sales representative insist on receiving detailed and confidential information about the customer's finances and/or personal life (e.g., bank account numbers and balances; value of life insurance, annuities, pensions)? Customers should be extremely wary about providing this type of information.
- Have other people filed complaints against this company? Anyone considering purchasing a living trust product should check with the local and state consumer protection offices and the Better Business Bureau *before* making any commitment. Consumers should be highly suspicious of any offer that is good "only today."

³⁹ Probate costs and attorneys' fees vary from state to state. The AARP *Product Report*, "Living Trusts and Wills" (Dec. 1991), explains these costs and provides several sample comparisons of estimated will/probate versus living trust costs. Also see the examples in the BOX above.

Be an Informed Consumer: Learn the Facts About Living Trusts

A living trust can be an extremely useful estate planning tool, but sweeping claims about what it absolutely will and will not accomplish in every situation need to be viewed with caution.

- A living trust can, but will not always, avoid probate.
- Once a will is submitted for probate, it becomes a matter of public record, while a living trust generally allows people to keep their affairs private. Such privacy is not guaranteed, however.
- Creditors may be able to reach assets placed in a living trust.
- Learn the cost of probate in your state; companies that sell living trust packages often exaggerate these costs.
- Find out how long it generally takes to probate a will in your state; this too is often overstated.
- Living trust sales representatives often exaggerate what an attorney will charge to draft and probate a will.
- Living trusts do not avoid inheritance, death, and income taxes.
- Make sure that a licensed, qualified attorney will prepare your trust documents; check with several such attorneys about how much they will charge for this service.
- Verify that the trust documents comply with state law.
- Make sure that your assets are transferred into the trust, and that later-acquired assets will be as well.
- For door-to-door sales, you are entitled to two copies of the notice of your right to cancel a contract within three days.

ABOUT THIS PUBLICATION . . .

Senior Consumer Alert is produced by the American Association of Retired Persons' Consumer Affairs Section (Program Coordination and Development Department) and the National Association of Attorneys General's Elderly and Consumer Law Subcommittee (Chairman, Robert Butterworth, Attorney General, Florida) in response to patterns of fraud or abuse detected nationwide affecting the older consumer.

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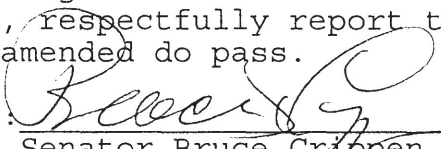
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SENATE STANDING COMMITTEE REPORT

Page 1 of 2
January 27, 1997

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration SB 163 (first reading copy -- white), respectfully report that SB 163 be amended as follows and as so amended do pass.

Signed: 
Senator Bruce Crippen, Chair

That such amendments read:

1. Title, lines 5 and 6.
Following: "IF" on line 5
Strike: remainder of line 5 through "OBJECT" on line 6
Insert: "NEITHER PARTY OBJECTS AND THE COURT AGREES"
2. Page 2, line 9.
Strike: "However, audio-video"
Insert: "Audio-video"
Following: "may"
Strike: "not"
Following: "if"
Strike: "the prosecutor"
Insert: "neither party"
3. Page 2, line 10.
Following: "objects"
Insert: "and the court agrees"
4. Page 2, line 24.
Strike: "However, audio-video"
Insert: "Audio-video"
Following: "may"
Strike: "not"
5. Page 2, lines 24 and 25.
Following: "if" on line 24
Strike: remainder of line 24 through "prosecutor" on line 25
Insert: "neither party"
6. Page 2, line 25.
Following: "objects"
Insert: "and the court agrees"
7. Page 3, line 11.
Strike: "However, audio-video"
Insert: "Audio-video"
Following: "may"
Strike: "not"

 Amd. Coord.
Sec. of Senate

191623SC.SRF

8. Page 3, lines 11 and 12.

Following: "if" on line 11

Strike: remainder of line 11 through "prosecutor" on line 12

Insert: "neither party"

9. Page 3, line 12.

Following: "objects"

Insert: "and the court agrees"

10. Page 3, line 20.

Strike: "However, audio-video"

Insert: "Audio-video"

Following: "may"

Strike: "not"

Following: "if"

Strike: "the prosecutor"

Insert: "neither party"

Following: "objects"

Insert: "and the court agrees"

11. Page 4, line 14.

Strike: "However, audio-video"

Insert: "Audio-video"

Following: "may"

Strike: "not"

12. Page 4, line 15.

Following: "if"

Strike: "the prosecutor"

Insert: "neither party"

Following: "objects"

Insert: "and the court agrees"

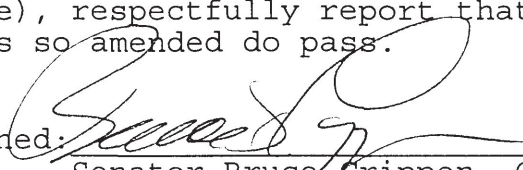
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SENATE STANDING COMMITTEE REPORT

Page 1 of 1
January 27, 1997

MR. PRESIDENT:

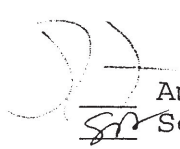
We, your committee on Judiciary having had under consideration SB 31 (first reading copy -- white), respectfully report that SB 31 be amended as follows and as so amended do pass.

Signed: 
Senator Bruce Crippen, Chair

That such amendments read:

1. Title, lines 4 and 5.
Following: "TREATMENT" on line 4
Strike: remainder of line 4 through "CASTRATION" on line 5
2. Page 1, line 9.
Following: "treatment"
Strike: "and surgical castration"
3. Page 1, line 20.
Following: "treatment"
Strike: "or surgical castration"
4. Page 1, lines 22 through 24.
Following: "and" on line 22
Strike: remainder of line 22 through "corrections," on line 24
5. Page 1, line 29.
Following: "treatment"
Strike: "or surgical castration"
6. Page 2, line 2.
Following: "treatment"
Strike: "or surgical castration"

-END-

 Amd. Coord.
Sec. of Senate

191601SC.SRF

MONTANA SENATE
1997 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 1-27 97 BILL NO. SB 31 NUMBER 1

MOTION: Gov DPAA

NAME	AYE	NO
SUE BARTLETT		✓
AL BISHOP	✓	
STEVE DOHERTY		✓
SHARON ESTRADA	✓	
MIKE HALLIGAN		✓
RIC HOLDEN	✓	
REINY JABS	✓	
WALT MC NUTT	✓	
LORENTS GROSFIELD, VICE CHAIRMAN	✓	
BRUCE CRIPPEN, CHAIRMAN	✓	
	7	3

**MONTANA SENATE
1997 LEGISLATURE
JUDICIARY COMMITTEE**

ROLL CALL

DATE _____

1-27 97

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MONTANA SENATE
1997 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 1-27-97 BILL NO. SB166 NUMBER 1

MOTION: Estrada - motion to Table

NAME	AYE	NO
SUE BARTLETT	✓	
AL BISHOP	✓	
STEVE DOHERTY	✓	
SHARON ESTRADA	✓	
MIKE HALLIGAN	✓	
RIC HOLDEN		✓
REINY JABS		✓
WALT MC NUTT	✓	
LORENTS GROSFIELD, VICE CHAIRMAN		✓
BRUCE CRIPPEN, CHAIRMAN		✓
	6	4

MONTANA SENATE
1997 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 11/27/97 BILL NO. 166 NUMBER 1

MOTION: Holden - amend 9 (sb016601.a.v1)

NAME	AYE	NO
SUE BARTLETT		✓
AL BISHOP		✓
STEVE DOHERTY		✓
SHARON ESTRADA	✓	
MIKE HALLIGAN		✓
RIC HOLDEN	✓	
REINY JABS	✓	
WALT MC NUTT	✓	
LORENTS GROSFIELD, VICE CHAIRMAN	✓	
BRUCE CRIPPEN, CHAIRMAN	✓	
	6	4

Amendments to Senate Bill No. 31
Second Reading Copy (yellow)

Requested by Senator Grosfield
For the Committee on Judiciary

Prepared by Valencia Lane
January 25, 1997

1. Title, lines 4 and 5.
Following: "TREATMENT" on line 4
Strike: remainder of line 4 through "CASTRATION" on line 5
2. Page 1, line 9.
Following: "treatment"
Strike: "and surgical castration"
3. Page 1, line 20.
Following: "treatment"
Strike: "or surgical castration"
4. Page 1, lines 22 through 24.
Following: "and" on line 22
Strike: remainder of line 22 through "corrections," on line 24
5. Page 1, line 29.
Following: "treatment"
Strike: "or surgical castration"
6. Page 2, line 2.
Following: "treatment"
Strike: "or surgical castration"

Ek
1-27-97
SB 163

Amendments to Senate Bill No. 163
First Reading Copy (white)

Requested by Senator Christiaens
For the Committee on Judiciary

Prepared by Valencia Lane
January 22, 1997

1. Title, lines 5 and 6.
Following: "IF" on line 5
Strike: remainder of line 5 through "OBJECT" on line 6
Insert: "NEITHER PARTY OBJECTS AND THE COURT AGREES"
2. Page 2, line 9.
Strike: "However, audio-video"
Insert: "Audio-video"
Following: "may"
Strike: "not"
Following: "if"
Strike: "the prosecutor"
Insert: "neither party"
3. Page 2, line 10.
Following: "objects"
Insert: "and the court agrees"
4. Page 2, line 24.
Strike: "However, audio-video"
Insert: "Audio-video"
Following: "may"
Strike: "not"
5. Page 2, lines 24 and 25.
Following: "if" on line 24
Strike: remainder of line 24 through "prosecutor" on line 25
Insert: "neither party"
6. Page 2, line 25.
Following: "objects"
Insert: "and the court agrees"
7. Page 3, line 11.
Strike: "However, audio-video"
Insert: "Audio-video"
Following: "may"
Strike: "not"
8. Page 3, lines 11 and 12.
Following: "if" on line 11
Strike: remainder of line 11 through "prosecutor" on line 12
Insert: "neither party"
9. Page 3, line 12.
Following: "objects"

Insert: "and the court agrees"

10. Page 3, line 20.

Strike: "However, audio-video"

Insert: "Audio-video"

Following: "may"

Strike: "not"

Following: "if"

Strike: "the prosecutor"

Insert: "neither party"

Following: "objects"

Insert: "and the court agrees"

11. Page 4, line 14.

Strike: "However, audio-video"

Insert: "Audio-video"

Following: "may"

Strike: "not"

12. Page 4, line 15.

Following: "if"

Strike: "the prosecutor"

Insert: "neither party"

Following: "objects"

Insert: "and the court agrees"

DATE Jan 27, 1997
 SENATE COMMITTEE ON Judiciary
 BILLS BEING HEARD TODAY: SB 79, 176

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Tom Ellis	Norwest Bank	S 79	X	
JOHN CADDY	MT BANKERS	S 79	X AMEND	
Verner Bertelsen	M. S. C. A	S 79	X	
Clyde Dailey	St. Auditor	S 79	X	
Bob Ryser	MT Credit Unions League	S 79	X	
Charles R. Brooks	Yellowstone County	176	X	
Gordon Morris	MACO	176	✓	
Vern Peterson	Fergus Co. / MACO	176	✓	
Beth Baker	Dept of Justice	79		
Susan Good	MALU	79	✓ Amend	
Greg Overdorf	Dept of Commerce	79	✓	
Russell B. Hill	MT Trial Lawyers	SB 176		✓
Dore H. Thewissen	A & R P	SB 79	✓	
Gene Hoffman	Self	79	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE

Jan 27, 1997

SENATE COMMITTEE ON

Judiciary

BILLS BEING HEARD TODAY:

SB 79, 176

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PLEASE PRINT

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Check One

Name	Representing	Bill No.	Support	Oppose
Tom Ellis	Norwest Bank	S 79	X	
JOHN CADDY	MT BANKERS	S 79	X AMEND	
Lerner Bertelsen	M. S. C. A	S 79	X	
Clyde Dailey	St. Auditor	S 79	X	
Bob Ryser	MT Credit Union League	S 79	X	
Charles R. Brooks	Yellowstone County	176	X	
Gordon Morris	MACO	176	✓	
Vern Peterson	Fergus Co./MACO	176	✓	
Beth Baker	Dept of Justice	79		
Susan Good	MACU	79	✓ Amend	
Greg Overdorf	Dept of Commerce	79	✓	
Russell B. Hill	MT Trial Lawyers	SB 176		✓
Thane H. Thewissen	A & R P	SB 79	✓	
Gene Hoffman	Self	79	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **SENATOR BRUCE D. CRIPPEN**, on January 29, 1997, at 9:00 a.m., in the Senate Judiciary Chambers (Room 325) of the State Capitol, Helena, Montana.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Lorents Grosfield, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Sharon Estrada (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter L. McNutt (R)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Jody Bird, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 43, posted January 23 1997
SB 201, SB 202, posted
January 22, 1997

Executive Action: SB 48, SB 99, SB 79, SB 176

EXECUTIVE ACTION ON SB 48

Amendments: Prior executive session.

Motion: SENATOR MIKE HALLIGAN MADE A MOTION THAT 48 DO PASS AS AMENDED.

Discussion: SENATOR HALLIGAN. The assumptions have been dropped to zero.

SENATOR RIC HOLDEN. We need to look at how this program will be funded. It's possible that the Fiscal Note could total \$1 million.

SENATOR HALLIGAN. The counties can set up a new center or use existing facilities/officers. We in the Study Commission just tried to ensure that we're not increasing the funding, but rather re-pool existing resources. We not talking about new dollars here, and so we are able to zero this thing out (EXHIBITS #1, #2, #3).

Vote: SENATOR HALLIGAN'S MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATOR HOLDEN WHO VOTED NO.

{Tape: 1; Side A; Approx. Time Count: #7.0; Comments: 9:14 a.m..}

EXECUTIVE ACTION ON SB 99

Amendments: SENATORS BARTLETT AND HALLIGAN.

Motion: SENATOR HALLIGAN MADE A MOTION TO ADOPT AMENDMENTS sb009903.avl.

Discussion: SENATOR HALLIGAN. Judge John Larson believes the Fiscal Note is zeroed out here, as well, and so it takes adult sentencing out to achieve this cost reduction. The extended jurisdiction allows the Court jurisdiction of juveniles to age 25, so they don't get out of recompensing the victim when they turn 18.

SENATOR HOLDEN. What does this Fiscal Note say? **SENATOR HALLIGAN.** This Fiscal Note will be null and void, and we will request a revision before the bill goes to the Senate floor for discussion.

Vote: SENATOR HALLIGAN'S MOTION TO ADOPT THE AMENDMENTS CARRIED UNANIMOUSLY.

Motion: SENATOR SUE BARTLETT MADE A MOTION TO ADOPT AMENDMENTS sb009902.avl.

Discussion: SENATOR BARTLETT. This strikes and repeals 41-5-208, MCA altogether, pertaining to transfer of supervisory authority to adult district court, on page 5 of the bill. Judge Diane Barz' opinion related to Section 208, posing a double jeopardy problem, i.e., the possibility of two sentences for the same crime. The Interim Study Commission looked at this section and tried to amend it as well.

SENATOR HALLIGAN. I wish I knew if SENATOR BARTLETT were correct. I do think there is a double jeopardy issue here, but am opposed to changing it now. I want to see the Fiscal Note, and read Judge Barz' decision, then talk to a few more judges in other states where this is already in operation.

SENATOR HOLDEN. Did you go over these amendments with the sponsor? **SENATOR BARTLETT.** No, I did not.

SENATOR HALLIGAN. What was Judge Larson's comment on this?

SENATOR BARTLETT. He wants to keep this language in the statutes, but I believe the Legislature has a responsibility to address the double jeopardy issue.

SENATOR STEVE DOHERTY. I also spoke to Judge Larson and got the same information, but Judge Barz does believe there is no problem in correcting the double jeopardy issue, and they're both pretty good judges. I believe Judge Barz' decision was well-reasoned and accurate. **VICE CHAIRMAN LORENTS GROSFIELD.** Now, in this bill, 208 is completely rewritten, so its a whole different deal. Would Judge Barz' decision be the same with 208 the way it is now? **SENATOR DOHERTY.** Her law clerk sent a memo saying she still sees the same problem, even with these changes.

CHAIRMAN CRIPPEN. The severability clause doesn't hurt this situation. **VICE CHAIRMAN GROSFIELD.** The severability clause doesn't apply to 208. **CHAIRMAN CRIPPEN.** But it would apply to this amendment. **SENATOR HALLIGAN.** These concerns are valid.

SENATOR BARTLETT. All the bill does is provide some due process procedures, but does not deal with the double jeopardy situation, leaving the potential for an adult sentence, as well as a juvenile sentence. It makes sense to pass this amendment, otherwise there is no assurance the issue will receive the same kind of consideration and attention.

{Tape: 1; Side: A; Approx. Time Count: #24.7; Comments: 9:32 a.m..}

Vote: SENATOR BARTLETT'S MOTION TO ADOPT AMENDMENTS sb009902.av1 FAILED IN A ROLL CALL VOTE (5-4).

Motion/Vote: SENATOR HALLIGAN MADE A MOTION THAT SB 99 DO PASS AS AMENDED. THE MOTION CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATOR BARTLETT WHO VOTED NO.

EXECUTIVE ACTION ON SB 79

Amendments: HALLIGAN amendments.

Motion: SENATOR MIKE HALLIGAN MADE A MOTION TO ADOPT HIS AMENDMENTS.

Discussion: Clyde Dailey. The amendments allow a licensing category as an investment adviser or investment adviser representative, and exempts national banks and trust corporations.

Vote: SENATOR HALLIGAN'S MOTION TO ADOPT HIS AMENDMENTS CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATOR HOLDEN WHO VOTED NO.

Amendments: sb007902.avl

Motion: VICE CHAIRMAN LORENTS GROSFIELD MADE A MOTION TO ADOPT HIS AMENDMENTS.

Discussion: VICE CHAIRMAN GROSFIELD. The estimate on the Fiscal Note is not a good one, as to how many will be licensed. If there are not enough licensees, the general fund would have to subsidize the program. This amendment gives the Department the authority to increase fees by rule, if they don't get enough licensees to fund appropriately.

CHAIRMAN CRIPPEN. I don't see any provisions for fines. VICE CHAIRMAN GROSFIELD. The amendment includes both fines and fees.

Vote: VICE CHAIRMAN GROSFIELD'S MOTION TO ADOPT AMENDMENTS sb007902.avl CARRIED UNANIMOUSLY.

Motion: SENATOR HALLIGAN MADE A MOTION THAT THE FINE BE CHANGED TO \$10,000, ON PAGE 6, LINES 2 AND 10.

Discussion: Clyde Dailey. If the fine goes up, the securities industry may have a problem with it. The fine is \$5,000 per violation now. SENATOR HALLIGAN. How long has the \$5,000 fine be in place. Clyde Dailey. About ten years, to the best of my knowledge.

Vote: SENATOR HALLIGAN'S MOTION TO AMEND CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATOR HOLDEN WHO VOTED NO.

Motion: SENATOR HALLIGAN MADE A MOTION THAT SB 79 DO PASS AS AMENDED.

Discussion: SENATOR RIC HOLDEN. I don't believe this needs to be done, as licensed attorneys can prepare this material properly. We will always have rip-off artists. The Department of Commerce said they could handle this under the Consumer Protection Act, if it were expanded. So, I believe we need a bill to do that.

CHAIRMAN CRIPPEN. The Auditor's Office is charged with insurance licensing and oversight, and has done a pretty fair job over the years. I like the bill, as I was involved in estate planning over the past years. The worst problems were the fly-by-nighters. This is something we have to do to protect our own industry from blemish.

Vote: SENATOR HALLIGAN'S MOTION THAT SB 79 DO PASS AS AMENDED CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SENATOR HOLDEN WHO VOTED NO.

EXECUTIVE ACTION ON SB 176

Amendments: sb017602.avl

Motion: VICE CHAIRMAN LORENTS GROSFIELD MADE A MOTION TO ADOPT AMENDMENTS sb 017602.av1.

Discussion: VICE CHAIRMAN GROSFIELD. This was SENATOR HERTEL's and MACO's (Montana Association of Counties). My sense is the bill is a dead duck, but I'm trying to offer something satisfactory. The amendments puts back in the deleted language, and attempts to define substantial hardship as exempting the family home and a vehicle necessary for work.

I found that some courts use a form and some don't, so the amendment requires the Department of Justice to prescribe a form and to make it available, for the disclosure of income and assets. This should provide more guidance.

SENATOR JABS. If we reinsert this language are we really making a change, and has the sponsor seen it? VICE CHAIRMAN GROSFIELD. SENATOR HERTEL saw it and was okay with it. My sense was it would not get out of committee without these changes.

CHAIRMAN CRIPPEN. "Necessities" is present law.

SENATOR BISHOP. What if the home is worth \$200,000 and is free and clear? VICE CHAIRMAN GROSFIELD. The language allows a judge to find specifically otherwise in determining hardship.

SENATOR DOHERTY. I believe it is a more specific approach, i.e., making judges have findings prior to assigning court-appointed counsel. Most court-appointed attorneys are busy enough, and if there is any way to have people find their own lawyer, that is good.

Vote: VICE CHAIRMAN GROSFIELD'S MOTION TO ADOPT AMENDMENTS sb017602.av1 CARRIED UNANIMOUSLY.

Motion/Vote: VICE CHAIRMAN GROSFIELD'S MOTION THAT SB 176 DO PASS AS AMENDED CARRIED UNANIMOUSLY WITH ALL MEMBERS VOTING AYE EXCEPT CHAIRMAN CRIPPEN WHO VOTED NO.

{Tape: 1; Side: A; Approx. Time Count: #55.5; Comments: 10:00 a.m..}

HEARING ON HB 43

Sponsor: REPRESENTATIVE PAUL BANKHEAD, HD 72, Heron.

Proponents: Diana Leibinger-Koch, Department of Corrections
Christopher Miller, Powell County Attorney, Montana
County Attorneys and for John Conner, Department
of Justice

Opponents: None

Opening Statement by Sponsor: **REPRESENTATIVE PAUL BANKHEAD, HD 72, Heron.** HB 72 deals with felony escape, including in transit to or from a facility. It changes the definition of official detention to "in the custody of." If they are in custody for a felony, then it would be felony escape.

{Tape: 1; Side: A; Approx. Time Count: #59.9; Comments: None.}

Proponents' Testimony: **Diana Leibinger-Koch, Department of Corrections.** This bill is designed to prevent this vicious cycle from recurring. We have been trying to plug this hole since the 1980s. It includes any inmate in the custody of the Department or any inmate on furlough (**EXHIBIT #4**).

Anyone who is in custody for a misdemeanor offense and escapes is guilty only of misdemeanor escape and/or eluding custody.

Christopher Miller, Powell County Attorney, Montana County Attorneys and John Conner, Department of Justice. Most escape cases are mine. I believe the bill will save time in the courts, will be easier for inmates to understand, and will have a good effect in any county dealing with such (**EXHIBIT #5**).

Questions From Committee Members and Responses: **SENATOR STEVE DOHERTY.** If an individual was in custody and escaped, would it be a misdemeanor offense? **Diana Leibinger.** Yes, but if they had a weapon, then it would be aggravated felony escape. If any have a weapon, however, then it would be aggravated felony escape for them.

SENATOR DOHERTY. How many have escaped in the last five years when they were outside or on work assignment? **Christopher Miller.** About 20.

SENATOR DOHERTY. What percentage of those were outside the prison walls versus inside? **Christopher Miller.** A total of 250??? escapes in the past five years includes centers around the state. We haven't had a successful escape from inside for about seven years.

Closing by Sponsor: **REPRESENTATIVE BANKHEAD.** Clearly the Supreme Court has issued the Legislature a challenge. I want to thank the Committee for its kind consideration of this bill.

HEARING ON SB 201

Sponsor: **SENATOR WILLIAM GLASER, SD 8, Billings**

Proponents: **REPRESENTATIVE DEB KOTTEL, HD 45, Great Falls**

Opponents: **Betty Waddell, Montana Association of Churches
Sharon Hoff, Montana Catholic Conference
Edward F. Sheehy, Jr., American Civil Liberties Union
(ACLU)**

Pastor Ken Moore, First Christian Church, Helena
Scott Crichton, Executive Director, ACLU of Montana

Opening Statement by Sponsor: SENATOR WILLIAM GLASER, SD 8, Billings. I didn't intend to elevate this situation to the level of a zoo, as has been done in prior years.

{Tape: 1; Side: A; Approx. Time Count: #73.2; Comments: None.}

This legislation says if someone is twice convicted of rape with seriously bodily injury to the victim, the Court has the option of the death sentence. The bill also applies to the same crime committed outside of Montana and then committed in Montana.

It provides a definition of rape with serious bodily injury. These criminals are hiding in closets and are not in public. Fifty percent of these predators are repeat offenders.

The Fiscal Note describes the bill. The average time served nationally for this crime is twelve years.

Proponents' Testimony: REPRESENTATIVE DEB KOTTEL, HD 45, Great Falls. The bill is not mandatory, but allows these offenses as consideration for a judge to allow the death penalty. Retribution means to equalize, to provide equity. If you are opposed to the death penalty in principle, there's nothing I can say.

There is more than one way to take a life or to tear the soul out of a person. Several years ago a man raped a six-month-old baby, and ripped her esophagus. Afterward that baby cringed whenever she heard a human voice.

People who have been raped might also have their throats cut or be beaten and left on the side of the road, and live through it. I am asking the Committee to give the Judiciary branch a tool to be used if a repeat offender commits crimes of such horrific nature that the death sentence seems appropriate.

Opponents' Testimony: Betty Waddell, Montana Association of Churches read from prepared testimony (EXHIBIT #6). This bill discriminates against the poor and minorities, as average prosecution costs are about \$200,000, and average defense costs are about \$5,000. Miscarriages of justice are nearly impossible to fix. Approximately 38 convictions were wrong in the past decade. Kansas estimated that reinstatement of the death penalty would cost about \$11.5 million per year. In Florida, the cost was \$3,178,628 for each of 18 executions.

This legislation is morally wrong, it is discriminatory, it is expensive, and it may serve to promote violence.

Sharon Hoff, Montana Catholic Conference. A few years ago, two elderly women friends in Helena were raped. I don't believe the

death penalty is a appropriate response to any crime. Look at Texas.

Rape is a compulsive, violent crime. This is not a deterrent. It is hardly ever appropriate to use the death penalty. We can punish without death.

Edward F. Sheehy, Jr., American Civil Liberties Union (ACLU).

The U.S. Supreme Court said those facing the death sentence must be represented by an attorney with capitol punishment experience. I am one of the few attorneys in Montana with this experience.

On it's face, the bill violates the Eighth Amendment, which prohibits cruel and unusual punishment "purposeless and needless form of pain and suffering". In Kober v Georgia, in a plurality opinion, the Court said it violated the Eighth Amendment and was grossly disproportionate to the crime.

We now have an effective means (since 1995) of punishing by allowing life imprisonment even for those convicted of rape for the first time. We also have prison without the possibility of parole for conviction of second offenses of rape.

Pastor Ken Moore, First Christian Church, Helena. What is appropriate retribution? We talked about the increased cost of the death penalty versus incarceration. In countries with execution, there has been a parallel of violence, even state by state in the United States.

Scott Crichton, Executive Director, ACLU of Montana, adding to Mr. Sheehy's comments. We stand for the rights of all, whether they are on the inside or the outside. Section 22 of the laws of the State of Montana, and the Eighth Amendment of the U.S. Constitution cover what is allowed as a responsibility concerning broadening and imposing the death sentence. We found that 90 percent of professional involved oppose the death sentence.

I noted that there are no professional criminologists present to testify in favor of this bill.

{Tape: 1; Side: B; Approx. Time Count: #00; Comments: 10:57 a.m.}

Questions From Committee Members and Responses: SENATOR MIKE HALLIGAN. I am looking at the actual section at the bottom of

page 2 of the bill. **REPRESENTATIVE GLASER.** If a person is convicted twice, then the death penalty option is available.

This bill was drafted by John Macmaster, and if there are any inconsistencies in the bill, I would appreciate the opportunity to correct them. There is no exception for the age of the

perpetrator. **REPRESENTATIVE KOTTEL.** Juveniles are not convicted of such crimes unless they are tried as an adult by petition. I see the error, and I believe it can be corrected.

SENATOR REINY JABS. Isn't it the purpose of the death penalty to remove perpetrators from threat to society?

SENATOR STEVE DOHERTY. If an individual were convicted of statutory rape, and did time, and then came to Montana, would that prior incident subject the individual to the death penalty?

REPRESENTATIVE KOTTEL. Unless statutory rape is listed, it may not be a rape where serious bodily harm was inflicted. This bill allows prosecutors to say that some horrific crimes deserve the death penalty to be equitable to the crime.

SENATOR DOHERTY. With respect to Mr. Sheehy's testimony on certain cases, does that opinion say that after raping two times the death penalty is unconstitutional? **REPRESENTATIVE KOTTEL.** That decision says to me that the death penalty is not cruel and unusual. There is no guarantee of equity in the statutes. The Supreme Court quite clearly leaves open the door that the death penalty is not cruel and unusual in certain cases outside of homicide.

SENATOR DOHERTY. With regard to the comment that there are a number of ways to take a life other than death, if the grocery store clerk in Great Falls who was shot several times had died, that would have been a capitol offense. Now, under this bill, how would this apply? Where do we draw the line in that particular case? Should we be talking about capitol crimes to include these instances? **REPRESENTATIVE KOTTEL.** These are legislative policy decisions. Although I am not opposed to the death penalty, in no way is it appropriate to not impost it when people survive an attack terribly scarred. What if Bundy had never killed those 56 victims, but did everything else to them? I can't see how it would make a difference if those women didn't actually die. The death penalty is not equal in all cases, so it is left to the Judge and the jury.

CHAIRMAN CRIPPEN. What is the Association of Churches' position on partial-birth abortion? **Betty Waddell.** We have no position on that.

Closing by Sponsor: **SENATOR GLASER.** We need to read the definition of serious bodily injury; 45-2-101, MCA, 64(f) or (a), creates "a substantial risk of death."

Recently, in Yellowstone County, a young woman gave a ride to a man who then raped her and tried to kill her. She survived, but is disfigured by knife wounds. Another man broke and older woman's leg, beat her and her husband, and then took sexual advantage of her husband.

{Tape: 1; Side: B; Approx. Time Count: #27; Comments: 11:11 a.m..}

Additionally, a woman rented a room in her home to a man who turned out to be a sexual pervert and who took advantage of her

son. Her son is now impaired. I talked with him, and he has difficulty speaking with anyone.

I believe these crimes are more serious than murdering the victim. My granddaughters, both Catholic and Protestant, and are with me on this. A lobbyist told me his point of view was not being expressed here by the Montana Association of Churches. In the vigilante days, Mr. Plummer never robbed another coach or killed another person.

CHAIRMAN CRIPPEN. There is a bill to amend the section in questions, so we will check its status prior to executive action.

HEARING ON SB 202

Sponsor: SENATOR BILL GLASER, SD 8, Billings

Proponents: REPRESENTATIVE BOB CLARK, HD 8, Ryegate

Opponents: Betty Waddell, Montana Association of Churches
Sharon Hoff, Montana Catholic Conference
Edward F. Sheehy, Jr., American Civil Liberties Union
(ACLU)
Pastor Ken Moore, First Christian Church, Helena
Scott Crichton, Executive Director, ACLU of Montana

{Tape: 1; Side: B; Approx. Time Count: #31; Comments: 11:14 a.m..}

Opening Statement by Sponsor: SENATOR BILL GLASER, SD 8, Billings. A more heinous crime is marketing drugs. Many years ago, I lived in Long Beach, California, where there were terribly high levels of crime from drugs sales and use.

You have the Fiscal Note before you. Six offenders were convicted of criminal sale of dangerous drugs in 1996, but average time in prison is one year.

This legislation is being presented to deal with the kingpins at the state level. The death penalty exists at the federal level now. Imprisonment isn't going to solve this problem.

Proponents' Testimony: REPRESENTATIVE BOB CLARK, HD 8, Ryegate. As a Highway Patrol Officer in Montana for 24-plus years, I saw the escalation of drugs moving through Montana. We are trying to stop the pipeline coming out of the South, the Southwest, and the West Coast, by showing drug traffickers we Montanans won't stand for this. If this bill passes legislative and constitutional muster, I believe it would do something toward payment of the ultimate price for this crime.

Opponents' Testimony: Edward F. Sheehy, Jr., American Civil Liberties Union (ACLU). I believe this bill would mean cruel and unusual punishment. No one yet has been charged under the

federal statute, so we don't have a case yet for drug kingpins. This bill includes those selling drugs and being convicted a second time, and not just solely drug kingpins. The mandatory minimum under federal court system sentencing, doesn't require longer than one years; time served is based on the amount sold. If the Committee were to pass this bill, we would need to build more cells at Montana State Prison. There is not room for convicted drug sellers now. Especially in Kalispell, they're given probation from sentences.

I understand **SENATOR GLASER's** intent and purpose. There is an active drug pipeline from Yakima, Washington to Montana. The Highway Patrol in Superior has been actively working to apprehend these people. The state system is now reliant upon the federal system. The drug of choice in Montana is now methamphetamine, and includes a lot of truck drivers.

{Tape: 1; Side: B; Approx. Time Count: #43; Comments: 11:27 a.m..}

CHAIRMAN CRIPPEN addressed the visiting school children in the gallery and explained the nature of the bill being heard.

Betty Waddell, Montana Association of Churches. The Association unanimously opposes capital punishment.

Sharon Hoff, Montana Catholic Conference. We consistently support victims rights, but we can't support the death penalty for this particular crime.

Pastor Ken Moore, First Christian Church, Helena. I believe my prior testimony on SB 201 applies here, as well.

Questions From Committee Members and Responses: **SENATOR STEVE DOHERTY.** Your intent is to get the individual at the street level, and if they are convicted, you want to get those higher up in the organization? **SENATOR GLASER.** I want to allow mitigating circumstances for cause to back off from the death penalty. This is a judicial decision, and they should have a tool to do this.

SENATOR DOHERTY. So, if someone is caught twice at the state level, this bill could apply to them, as well? **SENATOR GLASER.** Under certain circumstances, yes.

SENATOR DOHERTY. Is the death penalty only available when distribution of drugs results in a death? Is my understanding correct? **Edward Sheehy.** I believe so. It applies to drug kingpins or criminal entrepreneurs where someone dies as a result of drug sales.

SENATOR DOHERTY. Could anyone in that chain of dealing be charged, and could the judge impose a capital sentence. **Edward Sheehy.** No one in Montana has been charged in that fashion. It would depend on the case. If the seller were in a prison, and

sold to a prisoner who died as a result of use, that seller could receive the death sentence.

SENATOR DOHERTY. If a customer becomes a victim and dies, do we need to revise Montana statute to charge the dealer with a capital offense? **Edward Sheehy.** I would have to look at the Aggravating Circumstances statute and the Montana Criminal Enterprise statute.

SENATOR DOHERTY. The Fiscal Note is not very accurate. Can you give an estimate of the cost of a case i the capital area.

Edward Sheehy. The Attorney General's Office has never calculated the costs they incur. A case I had cost \$50,000 for a four-day trial, although some death penalty advocates do cases pro bono.

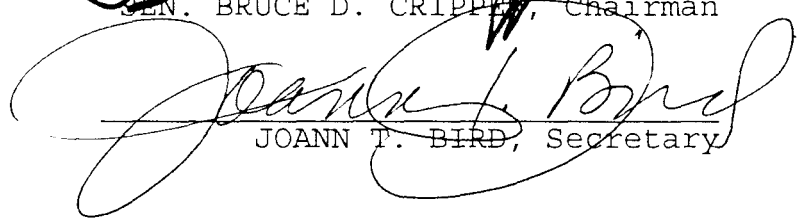
CHAIRMAN CRIPPEN. There appears to be some confusion concerning the number of convictions. **SENATOR GLASER.** Two times and first offense are not necessary in Montana. I will see John MacMaster about the language on page 1, line 16, subsection (3).

Closing by Sponsor: **SENATOR GLASER.** I have been in Yellowstone County a long time, and am a substantial taxpayer there, but at what cost is safety to society. My granddaughter is a student in Powell, Wyoming. She was at a party where a young man who dealt drugs raped a girl there, then killed her, but was able to plea-bargain for life in prison. We need a tool to clean up Montana, so it's safe again. I believe this bill is it.

ADJOURNMENT

Adjournment: 11:45 a.m.


SEN. BRUCE D. CRIPPE, Chairman


JOANN T. BIRD, Secretary

BDC/JTB

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN BOB CLARK, on March 5, 1997, at 8 AM,
in Room 312-1.

ROLL CALL

Members Present:

Rep. Bob Clark, Chairman (R)
Rep. Daniel W. McGee, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Shiell W. Anderson (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Duane Grimes (R)
Rep. H.S. "Sonny" Hanson (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Brad Molnar (R)
Rep. Gerald Pease (D)
Rep. Diane Sands (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)

Staff Present: John MacMaster, Legislative Services Division
Joanne Gunderson, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 44, SB 79, SB 54, SB 212

HEARING ON SB 44

Opening Statement by Sponsor: SEN. RIC HOLDEN
{Tape: 1; Side: A; Approx. Time Count: 1.0}

Proponents' Testimony:

ROGER MC GLENN, IIAM

{Tape: 1; Side: A; Approx. Time Count: 8.6; Comments: This
proponent was not listed with the Commissioner of Political
Practices nor was "IIAM" identifiable.}

ROBERT PHILLIPS, SAFECO Insurance Company

{Tape: 1; Side: A; Approx. Time Count: 10.7}

JACQUELINE LENMARK, American Insurance Association EXHIBIT 1
{Tape: 1; Side: A; Approx. Time Count: 17.2}

WARD SHANNAHAN, Farmers Insurance Group of Companies
{Tape: 1; Side: A; Approx. Time Count: 18.7}

LARRY AKEY, NAII
{Tape: 1; Side: A; Approx. Time Count: 18.9; Comments: This
proponent was not listed with the Commissioner of Political
Practices nor was "NAII" identifiable.}

RON ASHABRANER, State Farm Insurance Companies EXHIBIT 2
{Tape: 1; Side: A; Approx. Time Count: 19.4}

LORNA FRANK-KARN, Montana Farm Bureau
{Tape: 1; Side: A; Approx. Time Count: 21.4}

DWIGHT EASTON, Farmers Insurance Group of Companies
{Tape: 1; Side: A; Approx. Time Count: 22.7}

Opponents' Testimony:

JOHN MORRISON EXHIBITS 3 and 4
{Tape: 1; Side: A; Approx. Time Count: 23.9; Comments: This
witness did not sign in.}

RUSSELL HILL, Montana Trial Lawyers Association (MTLA) EXHIBIT 5
{Tape: 1; Side: A; Approx. Time Count: 33.4}

GENE JANUSSI, MTLA
{Tape: 1; Side: A; Approx. Time Count: 38.6}

Questions From Committee Members and Responses:
{Tape: 1; Side: A; Approx. Time Count: 40.5-Tape 1; Side B; 26.6;
Comments: REP. MC GEE assumed the chair.}

Closing by Sponsor: SEN. HOLDEN
{Tape: 1; Side: B; Approx. Time Count: 26.7}

HEARING ON SB 79

Opening Statement by Sponsor: SEN. CHRIS CHRISTIAENS
{Tape: 1; Side: B; Approx. Time Count: 30.3}

Proponents' Testimony:

CLYDE DAILEY, Montana State Auditor EXHIBITS 6-8
{Tape: 1; Side: B; Approx. Time Count: 34.0; Comments: Spoke
also on behalf of Beth Baker of the Attorney General's Office.}

GENE HOFFMAN
{Tape: 1; Side: B; Approx. Time Count: 40.7}

BOB PFEIFFER, Montana Credit Unions League

{Tape: 2; Side: A; Approx. Time Count: 1.7}

SUSAN GOOD, Montana Association of Life Underwriters

{Tape: 2; Side: A; Approx. Time Count: 4.1}

BILL OLSON, AARP

{Tape: 2; Side: A; Approx. Time Count: 5.5}

GREG OVERTURF, Department of Commerce

{Tape: 2; Side: A; Approx. Time Count: 6.0}

GENE JANUSSI

{Tape: 2; Side: A; Approx. Time Count: 6.9}

ERN BERTLESEN, Montana Senior Citizen's Association

{Tape: 2; Side: A; Approx. Time Count: 8.1}

MORRIS BRUSETT, Montana Conference of Seventh-Day Adventists

EXHIBIT 9

{Tape: 2; Side: A; Approx. Time Count: 9.1}

Questions From Committee Members and Responses:

{Tape: 2; Side: A; Approx. Time Count: 11.4-36.0}

Closing by Sponsor: SEN. CHRISTIAENS

{Tape: 2; Side: A; Approx. Time Count: 36.2}

HEARING ON SB 54

Opening Statement by Sponsor: SEN. DEBBIE BOWMAN SHEA

{Tape: 2; Side: A; Approx. Time Count: 37.5}

Proponents' Testimony:

GENE KIZER, Montana Board of Crime Control

EXHIBIT 10

{Tape: 2; Side: A; Approx. Time Count: 40.3}

JOHN CONNOR, Department of Justice

{Tape: 2; Side: B; Approx. Time Count: 8.2}

MIKE CRONIN, Department of Corrections

{Tape: 2; Side: B; Approx. Time Count: 10.2}

Questions From Committee Members and Responses:

{Tape: 2; Side: B; Approx. Time Count: 12.3}

Closing by Sponsor: SEN. SHEA

{Tape: 2; Side: B; Approx. Time Count: 26.8}

HEARING ON SB 212

Opening Statement by Sponsor: SEN. WALTER MC NUTT

{Tape: 2; Side: B; Approx. Time Count: 28.8}

Proponents' Testimony:

JOHN ALKE, Montana Defense Trial Lawyers
{Tape: 2; Side: B; Approx. Time Count: 31.0}

GLORIA PALADICHUK
{Tape: 2; Side: B; Approx. Time Count: 34.5; Comments: This witness did not sign in.}

JACQUELINE LENMARK, American Insurance Association
{Tape: 2; Side: B; Approx. Time Count: 34.9}

TOM HOPGOOD, State Farm Insurance Company
{Tape: 2; Side: B; Approx. Time Count: 35.8} EXHIBIT 11

Opponents' Testimony:

GENE JANUSSI
{Tape: 2; Side: B; Approx. Time Count: 37.2}

RUSSELL HILL, MTLA
{Tape: 3; Side: A; Approx. Time Count: 5.3} EXHIBIT 12

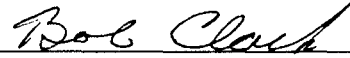
Questions From Committee Members and Responses:
{Tape: 3; Side: A; Approx. Time Count: 11.3-28.8}

Closing by Sponsor: SEN. MC NUTT
{Tape: 3; Side: A; Approx. Time Count: 28.9}

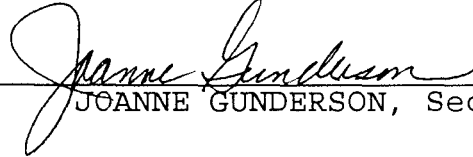
MOTION/VOTE: REP. MC CULLOCH MOVED TO ADJOURN. THE MOTION carried by unanimous voice vote.

ADJOURNMENT

Adjournment: The meeting was adjourned at 11:50 AM.



REP. BOB CLARK, Chairman



JOANNE GUNDERSON, Secretary

BC/jg

TRUSTS: Deceased's interest in accounts constituted "marital property," not available to fund bequests... trust minute invalidly executed... cotenancy equal interests rebutted, apportioned according to contribution... trustee entitled to fees/costs... Lympus affirmed, reversed.

Clifford & Mary Dern bought trust documents from American Family Living Trusts, under which marital property would become part of the Marital Trust Estate and go to the surviving spouse, and separate property would become part of the Separate Trust Estate and be distributed according to the Trust with any residue going into the Family Bypass Trust. The Bypass Trust named the surviving spouse as income beneficiary, and the surviving spouse and Dernas' descendants as principal beneficiaries. Clifford's Separate Trust Estate provided that his property (timber parcels and the farm on which he and Mary lived) be distributed among his 4 children if he predeceased Mary. Mary owned property in joint tenancy with her 2 children which was never transferred to the Trust. The Trust provided for distribution of \$10,000 from Clifford's Separate Trust Estate to each of his 4 children. Clifford & Mary transferred to the Trust bank accounts and CDs (valued at \$73,923 at the time of Clifford's death in 12/91). In 11/91 they deeded 5 parcels of property to the Trust, and amended it by 4 trust minutes, the disputed one of which left the farm to Mary. After Clifford's death Mary signed deeds as trustee, conveying the real estate as provided for in the Trust. However, she subsequently learned from a lawyer that Clifford's son Derril was to succeed as co-trustee and his signature was required on the deeds. Derril refused to sign and this litigation ensued. Judge Lympus concluded that Clifford's half interest in bank accounts constituted part of the Marital Trust Estate and was therefore not available for the \$10,000 bequests and that the 4th trust minute was validly executed. The Dern children appeal. Mary cross-appeals denial of fees & costs.

Lympus correctly characterized Dernas' joint bank accounts and CDs as part of the Marital Trust Estate and therefore unavailable to fund the \$10,000 bequests to the Dern children. Because the Trust does not define what constitutes marital or separate property, intent of the parties must be discerned. Lympus found and the record indicates that Dernas treated their checking & savings accounts as marital property. The record clearly supports Lympus's determination that they regarded the Norwest accounts as marital property throughout their marriage. Consequently, these accounts became part of the Marital Trust Estate. Lympus also correctly found that the circumstances surrounding opening and use of the Whitefish account indicated that it was a joint account to be treated as marital trust property.

Lympus erred in determining that the 4th trust minute was validly executed. It was signed by Clifford alone, while reading all provisions together so as to give effect to all, it is clear that to amend the Trust, Clifford & Mary were required to act together and sign and date any such minute. Therefore, the farm continued as part of Clifford's Separate Trust Estate and became property of his children. While it is inconsistent that trust minutes 1, 2, and 3, each of which contains only 1 of the settlors' signatures, have likewise not been invalidated, the parties chose only to litigate the 4th minute.

Lympus, finding that the Norwest accounts were held in joint tenancy, correctly apportioned half their value to Clifford's interest in the Marital Trust Estate. He also correctly apportioned the Whitefish account, which they held as tenants in common, according to contribution. Because the evidence does not clearly prove that Clifford intended to confer his excess contribution to the account to Mary as a gift, the exception to the unequal contribution rule (relatives/spouses giving equal interest as gift) does not apply. Before apportioning the Whitefish account, deductions may be necessary to satisfy funeral expenses, costs, and fees. 60% of the remainder should be apportioned to Clifford's interest and 40% to Mary's interest in the Marital Trust Estate, as Lympus held.

Lympus erred in denying Mary her fees & costs. Costs

are provided for in the Trust and were a necessary expense of administering it since Derril had refused to sign the deeds conveying properties left to the beneficiaries through the trust minutes.

Nelson, Turnage, Gray, Erdmann.

Leaphart, Hunt, and Trieweller dissented as to validity of the 4th trust minute. The narrow instructional language found only in the trust minutes should not defeat the settlors' intent where amendment provisions throughout the Trust are ambiguous. It is apparent that Clifford and Mary were "acting together" when they amended the trust.

Estate of Dern Family Trust and Clifford Dern, 95-368, 11/14/96.

Steven Cummings & Donald Murray (Murphy, Robinson, Heckathorn & Phillips), Kalispell, for Mary; Roger Sullivan (McGarvey, Heberling, Sullivan & McGarvey), Kalispell, for the Dern children.

EXHIBIT 6
DATE 3/5/97
SB 79

Senate Bill 79

Testimony of Beth Baker
Department of Justice

Before the House Judiciary Committee
March 5, 1997

The Attorney General's Office initially became involved with the issue of living trusts in 1991, when then-Attorney General Racicot, in response to concerns raised to this office, wrote a letter encouraging the State Bar to provide public education on the potential problems for consumers who purchase living trusts without individual consultation.

In 1993, the Attorney General received a letter from the Montana Bankers Association urging this office to join with the efforts of other states to monitor the marketing of living trusts and prevent abuses. The Attorney General was also contacted by the Tax and Estate section of the State Bar of Montana with similar concerns.

In an attempt to explore a resolution to the problem, we met with the State Auditor's Office, the Department of Commerce, and representatives of interested organizations. The consensus at that time was that current state law does not directly address the problem, but that consumer education would be the critical first step toward preventing many of the problems associated with one-size-fits-all living trust documents. A brochure was developed in cooperation with now-Dean of the University of Montana Law School Ed Eck and funded with assistance from AARP, and has been widely distributed by the Consumer Affairs Office of the Department of Commerce.

While the brochure is helpful in educating consumers, we agree that an enforceable law is a necessary partner to that consumer education. For some Montanans a living trust may be a useful device to obtain asset management or handle out-of-state property ownership at time of death. However, trusts are complicated and sometimes irrevocable and should be entered into only after receiving advice from a professional with expertise in estate planning. Senate Bill 79 provides the necessary enforcement authority to prevent scam artists from exploiting Montana consumers, and we urge favorable consideration.

I have given to the Committee Secretary a copy of a Senior Consumer Alert produced by the National Association of Attorneys General's Elderly and Consumer Law Subcommittee in conjunction with the AARP's Consumer Affairs Section. The bulletin demonstrates some of the pitfalls that consumers have experienced with living trust mass solicitations and may be useful to the committee in explaining the scope of the problem.

WINTER 1993/94

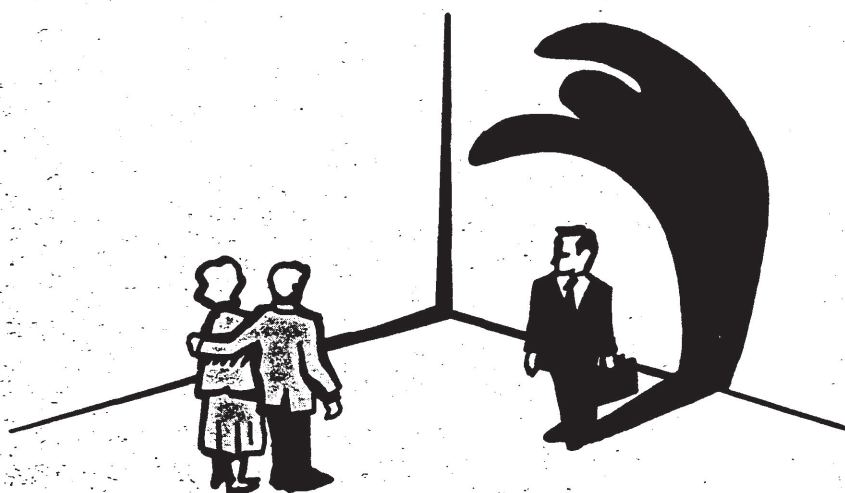
ALERT

A Special Bulletin for Complaint-Handlers

Living Trust or Living Nightmare?

The following script and similar scenarios have become all-too-familiar in recent months:

A retired couple in Maine received a postcard from the American Association for Senior Citizens (AASC),¹ offering information on estate planning, particularly how to avoid the delays and high costs associated with having to probate a will. The couple mailed in a detachable portion of the card seeking more information, and shortly thereafter a sales representative contacted them, set up an appointment, and came to their home.



Produced by the
 American Association of
 Retired Persons, in
 cooperation with the
 National Association of
 Attorneys General.
 Prepared by the National
 Consumer Law Center

¹ This description is based on allegations made by the states of Maine and Washington in their lawsuits against the American Association for Senior Citizens, filed April 14, and August 6, 1992, respectively, and on statements made in affidavits filed with the complaints.

During the visit, the representative described the benefits of joining AASC, including a discount merchandise catalogue, discount prescriptions, and membership in a prepaid legal plan. The services provided by the prepaid legal plan included the preparation of a living trust. The salesman gave the couple a sheet that listed the costs of several estate planning options. Based on the salesman's estimate that the couple's estate was worth approximately \$240,000, he told them it would cost them at least \$24,000 to probate their estate if they did "nothing" with respect to estate planning. The sales representative also stated that a private attorney would charge them approximately \$10,000 to draw up a living trust, pour-over wills, powers of attorney, and to settle their estates. Finally, the sales representative presented a third option — join AASC, the cost of which ranged from \$2,295 for an estate worth up to \$200,000, to \$6,895 for estates worth more than \$1 million; after the first year of membership, the couple would have to pay \$30 per month to maintain their membership.

The salesman gave the couple a pamphlet that emphasized the high cost, complexity, and delays associated with probate. After repeated calls from the salesman, the couple gave him a check for the first year's membership. In exchange for the names of five retired friends who owned property, he offered them a certificate for \$250 in discounts on products for sale in a catalogue sent to AASC members; they never received the certificate. The couple never received a written contract from AASC, only an "official receipt," which did not contain AASC's address and did not inform the couple of their right to cancel the contract within three days. One month later, the couple received a living trust and "pour-over" wills in each of their names.

The couple had several questions about the documents, and telephoned an Arizona attorney whose name was printed on the form document. Dissatisfied with his response, they called the original sales representative to cancel their membership; he told them that this was impossible. One week later, the couple finally received a contract from "Prepaid Legal Services, Inc.," AASC's Oklahoma-based "legal service document service."²

This couple's experience is by no means unique. A number of groups around the country have been aggressively marketing living trusts to older Americans. Salespeople approach potential customers with slick materials full of seemingly useful information about a simple, inexpensive way to save thousands in taxes and probate, allowing them to leave a larger inheritance for their loved ones. An explicit message is given, or at least an implicit impression is

left, that the offer is a once in a lifetime opportunity that will soon expire, often the same day! For example, Charles Barnard, Travel Editor of AARP's *Modern Maturity*, wrote that an AASC representative told him that his name would be deleted from the company's computer if he did not apply for membership the day the representative was in his home.³

Rather than offering objective information that would help a consumer decide if a living trust is appropriate to meet his or her particular needs and goals, many of these companies use scare tactics, gross misrepresentations, and high pressure sales techniques to convince unsuspecting elders to purchase products and services of questionable value and uncertain savings, all at inflated prices.

A new breed of scam artist has thus begun to prey on the older American's concern about protecting his or her assets after death. This newsletter describes common

² See complaint filed in *Illinois v. American Ass'n for Senior Citizens*, No. 92 MR 269 (Ill. Cir. Ct. filed 9/23/92), at p. 9.

³ See AARP's *Bulletin*, Vol. 33, No. 4, April 1992, p. 1.

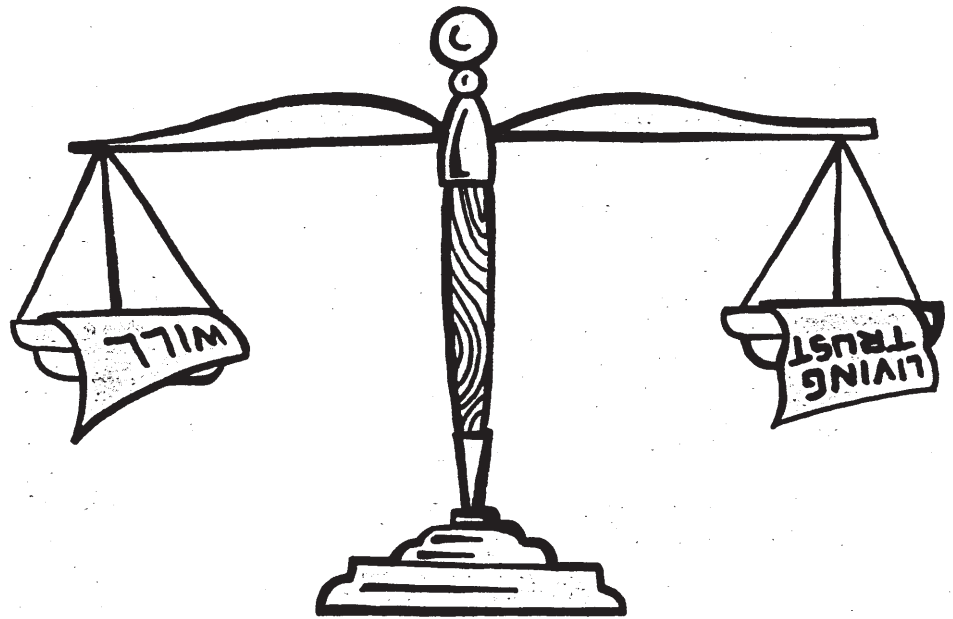


sales schemes and some of the leading actors. It also presents information to help older Americans and advocates evaluate the range of estate planning choices.

Wills & Living Trusts — What's the Difference?⁴

Today, estate planning includes many alternatives to a simple will, which once was the usual choice. Older people, in particular, are being urged to consider a host of options, through mail solicitations, television advertisements, news articles, and door-to-door sales. Often hyped among these choices are living trusts, also known as irrevocable or revocable living trusts, or "inter vivos" trusts. Promotional materials often mention the advisability of having a living will, as well.⁵ Basic explanations of wills and trusts will help readers better understand the rash of recent "trust" scams.

A *WILL* is a legal document in which an individual gives directions about how his or her property should be distributed after death. It does not take effect until the death of the person who executed it (the "testator" or "testatrix"). The will names a personal representative, usually called an "executor," an individual or institution responsible for making sure that the property is



distributed to named beneficiaries. Depending on the type of property, its value, and state law, the will may have to be "proved" in a court process, called "probate." (Some types of property, such as life insurance and pension benefits, are not subject to the probate process and pass directly to the named beneficiaries.) Various costs are associated with probate, including filing fees, personal representatives' fees, and attorneys' fees. These expenses are deducted from the value of the property that otherwise would be distributed to beneficiaries. Moreover, property cannot be distributed until probate is completed, which often takes a year or more.

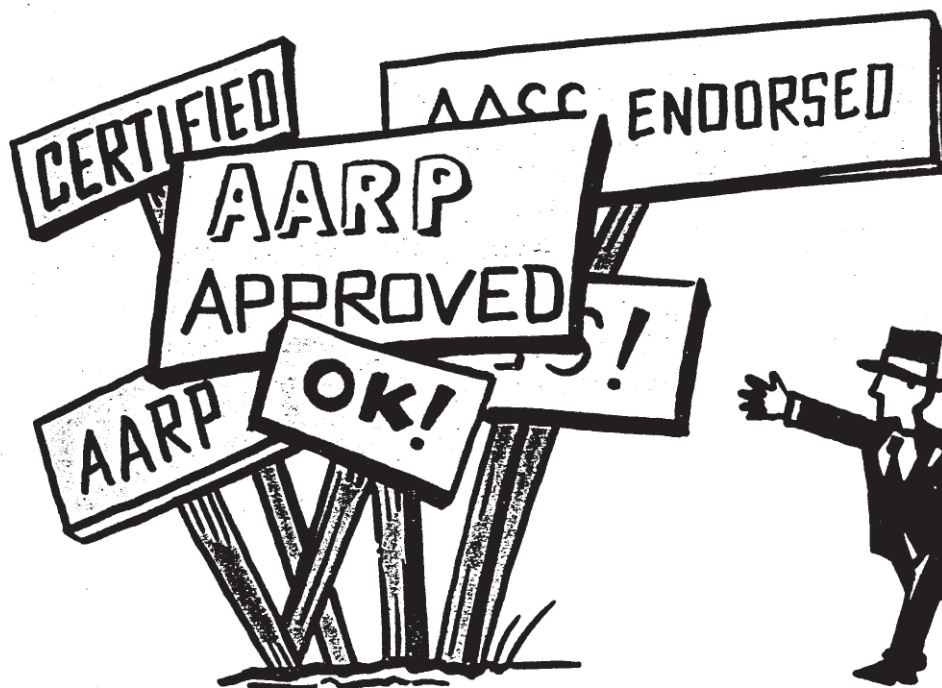
By contrast, a *LIVING TRUST* is a legal estate planning document that takes effect during a person's lifetime. The person who creates the trust — the "settlor," "grantor," or "creator" — transfers property to the trust and names a "trustee" who manages the property during the settlor's lifetime. If the trust is revocable, the settlor can change its terms and even revoke it, as long as he or she remains legally competent. The settlor often

appoints himself or herself as the trustee, but is free to appoint someone else. If the settlor acts as trustee, he or she also names a backup or successor trustee to distribute the trust property after the settlor's death. This is similar to what the personal representative, described above, does under a will; however, a trust generally does not go through the probate process. If the trustee is a "volunteer" — a family member or friend of the settlor — there is relatively little expense involved in a living trust, apart from the costs to draft the necessary documents, change title to property, and make future property transfers. If a "professional" trustee is named, the costs are greater and, as will be illustrated, in some cases are extraordinary!

With this basic information about these very different documents, the remainder of this newsletter will focus on the schemes involving living trusts and the actions taken to regulate their marketing and to halt the obvious scams. Also included are tips on how to make sound estate planning decisions.

⁴ Much of the explanatory material in this section is taken from the consumer booklet, "Living Trusts and Wills" (AARP Product Report, Dec. 1991; stock # D14535). Readers seeking more detailed information can obtain this free publication from AARP Fulfillment, 601 E St., N.W., Washington, D.C. 20049.

⁵ A living will serves a completely different purpose, and it is not discussed in this newsletter. In a living will, people state their wishes about the medical care they do and do not want administered in the event of a terminal illness or permanent vegetative state when they are legally incompetent to make and communicate binding decisions. A living will can be a useful tool to avoid the appointment of a guardian for medical decisions, but it is completely unrelated to the transfer of property at death.



The Key Players — AASC & Its Relatives

It is no coincidence that some sellers of living trusts have, as an initial marketing ploy to gain a consumer's trust, taken names that are easily confused with organizations such as the American Association of Retired Persons (AARP). AARP does *not* sell or endorse any living trust product, and does not work cooperatively with any company that promotes or sells such documents.

The American Association for Senior Citizens (AASC) is a prime example of this type of company. Consumers repeatedly have complained that this and other companies actually have implied that they are related to AARP. In a common opening pitch, the salesperson asks if the potential customer is a member of AARP, or if he or she read about the company in *Modern Maturity* magazine (which, in its August-September 1991 issue, ran an article about the pros and cons of living trusts — but did *not* endorse any company or product.⁶)

In its suit against AASC, the State of Washington alleged that

AASC "represent[s], directly or by implication, that AASC is approved by, an affiliate of, or is associated with the American Association of Retired Persons (AARP)."⁷ Bolder still, according to a complaint filed by the Maine Attorney General against AASC, a telemarketer calls seniors stating that "there are AARP . . . representatives in the area who want to help its members with a living trust and asks if the senior citizen would like to receive more information from an AARP representative."⁸ As the complaint states, "AARP is not associated with AASC and has, in fact, issued bulletins to its members warning of the tactics employed by Defendant's salesmen."⁹

AARP and the Attorneys General of various states have received numerous complaints about living trust schemes. This newsletter addresses several representative companies, their sales practices, and legal actions known to have

been taken against them. Readers who want more complete information can contact the National Association of Attorneys General (NAAG).¹⁰

(1) American Association for Senior Citizens (AASC):

According to Evan Karnes II, a Chicago attorney for a former AASC officer, AASC closed its doors at the end of July or the beginning of August 1992, and has not conducted business of any kind since then.¹¹ We nevertheless describe its practices to illustrate the scope of the problem. Moreover, consumers have complained that other companies are using the same tactics.¹²

¹⁰ Please contact: Emmitt Carlton, NAAG, 444 N. Capitol St., N.W., Washington, D.C. 20001, (202) 434-8016, or Jack Norris, NAAG Elderly and the Law Subcommittee, 4000 Hollywood Blvd., Suite 505-S, Hollywood, FL 33021, (305) 985-4780.

¹¹ Telephone conversation on 9/24/93 between Mr. Karnes and Deborah Zuckerman, Staff Attorney, AARP Consumer Affairs.

¹² Furthermore, Attorneys General in some states still have cases pending against AASC. In addition, Pre-Paid Legal Services, Inc., through which AASC promised "Free Legal Services for Preparation of a Revocable Living Trust by a Qualified Attorney," and other legal services, lives on.

⁶ For a first-hand account of such a sales pitch, see AARP's *Bulletin*, *supra* note 3.

⁷ See *Washington v. American Ass'n for Senior Citizens*, No. 92203442-0 (complaint filed 8/6/92), at p. 6.

⁸ See *Maine v. American Ass'n for Senior Citizens*, complaint filed 4/14/92, at p. 4.

⁹ *Id.* at 5.

AASC's membership materials described it as a "Nationwide Non-Profit Organization" located in Washington, DC. A membership letter stated that AASC was "entrusted with getting the message to" older people, so that they "can receive every benefit and advantage to make sure the dollars [they] have spent a lifetime earning and saving will pass on to [their] heirs as intact as Uncle Sam will allow." With this responsibility as its "driving force," the letter goes on to state that the "Association explored every conceivable avenue available before making the decision to educate our membership on the value and importance of REVOCABLE LIVING TRUSTS." Finally, the letter indicates that AASC is committed to a "PRE-PAID LEGAL benefit that actually pays the legal fees for your REVOCABLE LIVING TRUST."

An AASC advertisement placed in a Poughkeepsie, NY, newspaper, to recruit sales representatives, gives a flavor for its operating philosophy: "American Association for Senior Citizens . . . Find a huge, recession-proof market & fill a need. Well, we found it, we built it and they're coming. Our top reps average over \$2000 comm. per week. Our managers are ridiculously overpaid. In short, a closer's 'field of dreams.'" Unusual language for a "non-profit" group!

The anecdote at the beginning of this newsletter gives a clear picture of AASC's sales tactics:

- written materials and sales representatives grossly exaggerated the costs of probating a will;
- out-of-state attorneys, who often were not licensed in the customer's state and may not have been familiar with the applicable state law, prepared living trust documents;

- consumers approached door-to-door were not notified of their right to cancel the contract;¹³ and
- the cost of preparing the trust far exceeded the rate that a local attorney would have charged to draft a similar living trust document.

(2) American Association for Retired Citizens (AARC):

The Illinois Attorney General's Office obtained a January 21, 1992 memorandum addressed to "Illinois Insurance Agents," and accompanying materials, entitled "The AARC Opportunity." In addition to stating how a living trust can benefit consumers, AARC's written materials illustrate a potential problem for consumers: in providing sales representatives (in this case insurance agents) with the information necessary for a living trust, the consumer also is revealing information that the salesperson can

use to sell other products, such as life insurance and annuities.

The materials provided by the Attorney General's Office described AARC as "a national organization dedicated to enabling retired and senior citizens to pass the greatest amount of their estate to their heirs as effectively, as quickly, as prudently and as intact as possible."¹⁴ The memo stated that revocable living trusts "will save your clients thousands of dollars in probate and attorney fees."¹⁵ Perhaps more importantly, however, AARC's materials stressed how its sales representatives can share the spoils. AARC noted that "Americans 65 years and older represent the fastest growing segment of the population . . . [and] have more discretionary income available to spend than any other age group."¹⁶

While AARC's memo noted the "great degree of personal and professional satisfaction realized from providing a high quality, cost saving, unique, and valuable

¹³ Where the sale is door-to-door, state and federal Home Solicitation Sales Acts, which allow a 3-day cooling off period, will apply. See generally 16 C.F.R. § 429 (FTC) and National Consumer Law Center (NCLC), *Unfair and Deceptive Acts and Practices* § 5.8.2 (3d ed. 1991 and Supp. 1992). NCLC's publication discusses the FTC and state rules.

¹⁴ All quotations are from AARC's 1/21/92 memo to insurance agents and accompanying AARC materials.

¹⁵ *Id.*

¹⁶ *Id.*



service," this reward was in addition to the "obvious financial benefits you derive from marketing a benefit package which includes Living Trust Preparation."¹⁷ That statement was relatively mild, however, compared with AARC's other "hooks." For example, the memo stated that the benefit of living trust preparation "typically attracts the aggressive Insurance Professional to our opportunity," and that the revocable living trust not only is "rapidly becoming the pre-eminent tool for modern day estate planning, it is also the newest 'success formula' for annuity and senior market agencies to generate additional sales with existing, as well as new, clients."¹⁸ Finally, the memo to insurance agents stated that a living trust applicant "must expose the location of every asset dollar in their portfolio. This creates an invaluable opportunity for asset redistribution and annuity sales!"¹⁹ (All emphases in

original memo.) Thus, as prospective sales representatives learn more about living trusts, they will better appreciate the value to their clients, and can "watch [their] insurance business prosper!"²⁰

Given AARC's marketing to potential sales representatives, it is not surprising that complaints have surfaced about the company's tactics and services. The Illinois Attorney General's office conducted an investigation, and now indicates that AARC is not doing business in that state. A New York State Police officer called AARP to report a complaint from a man who had attended an AARC seminar for potential sales representatives in Newburgh, NY. The seminar participant indicated that attendees were advised not to "leave [a prospect's home] until you have a check for \$3,000," and all the financial information necessary for a living trust. The participant also reported that trainees were told to bring a copy of AARP's magazine, *Modern Maturity*, to gain legitimacy with prospective customers.

The State of Missouri recently sued AARC and Caldwell Legal, U.S.A., the company through which AARC told customers they would receive pre-paid legal services.²¹ In seeking preliminary and permanent injunctions, the state alleged that AARC sold memberships to Missouri residents for amounts exceeding \$1,000, and "represented to consumers that membership with AARC would entitle consumers to benefits including . . . [a] revocable living trust prepared by a qualified attorney in your state of residence."²² In fact, the state charges that AARC ordered living trust documents from Caldwell Legal, a California corporation, that "[n]o attorneys licensed to practice law in Missouri, or qualified in Missouri, assembled, drafted, or prepared the revocable living trusts or the other legal documents," and that "[d]efendants did not advise the consumers prior to sale that no Missouri attorneys were actually involved in the preparation of the documents."²³

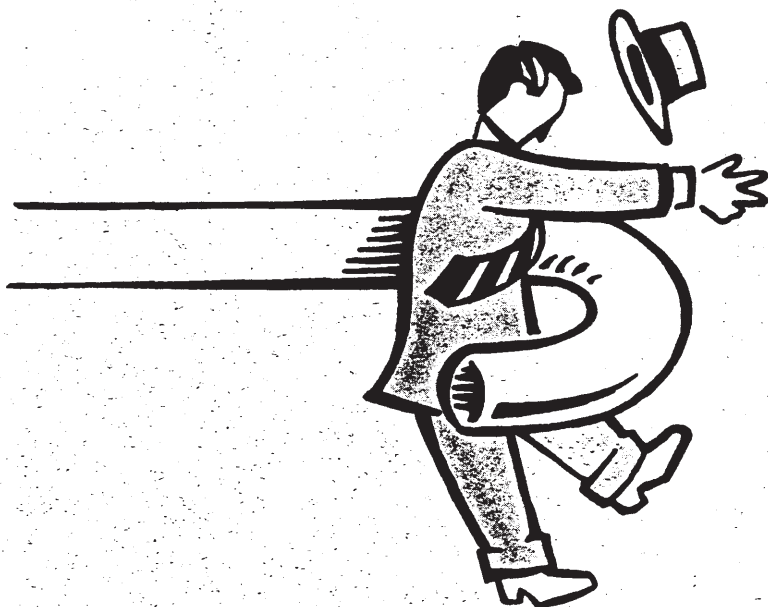
The suit further alleges that the defendants "misled consumers into believing that they were qualified and authorized to select, design, prepare and fully complete an estate plan, including legal documents tailored to the unique needs and desires of particular consumers."²⁴ Moreover, the defendants "failed to disclose in a meaningful way that professional advice should be sought prior to purchasing the membership in order to obtain the revocable living trust package sold by Defen-

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*



²¹ *Missouri v. American Capital, Inc., d/b/a American Ass'n for Retired Citizens*, No. 93CC052376 (Mo. Cir. Ct. Boone County; complaint filed June 29, 1993).

²² *Id.* at 6.

²³ *Id.* at 8.

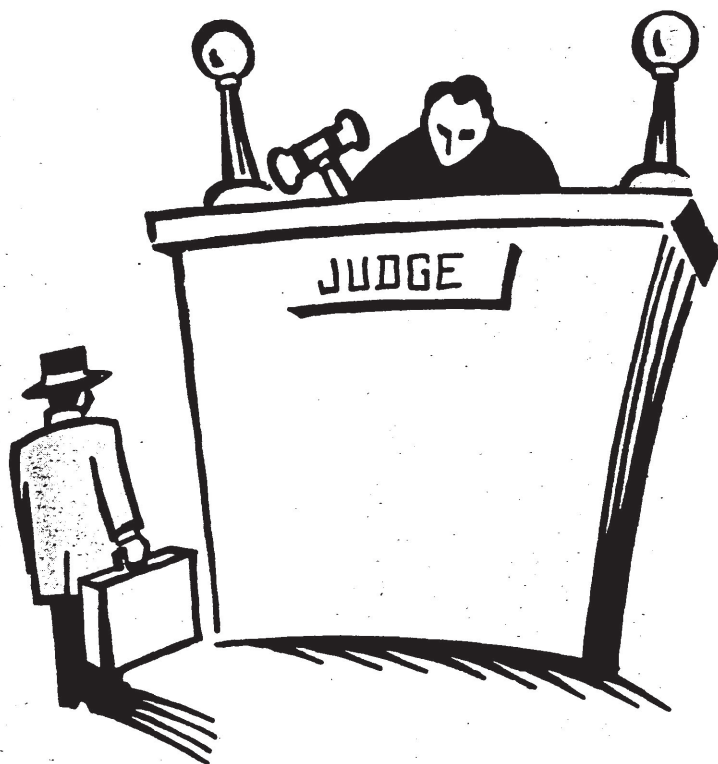
²⁴ *Id.* at 9.

dants."²⁵ Finally, the state charged that the defendants: misrepresented the costs of probate in Missouri; did not accurately compare the cost of a living trust to the amount a consumer could expect probate to cost; erroneously gave the impression that a living trust can decrease inheritance taxes; misrepresented the need for a living trust to reduce estate taxes; misrepresented the "agonies of probate and exaggerate[d] the merits of a living trust"; failed to reveal the potential drawbacks of living trusts; and gave "the impression that a living trust is the superior estate planning tool for all or most consumers regardless of the individual needs, desires or circumstances of a particular consumer."²⁶

In addition to charging the defendants with fraud, deception, and unfair practices, the state also alleges that they engaged in the practice of law without a license. The state asked for various relief, including an injunction to prevent the defendants and its agents from selling revocable living trusts to Missouri consumers; full restitution for all consumers who have been aggrieved by their purchases from the defendants; and a civil penalty of \$1,000 per violation of the state statute regulating the practice of law.

(3) Other Companies & Individuals:

Complaints by older consumers also led to lawsuits against other companies and individuals in connection with the marketing and sale of living trusts, including: Beneficial Living Trust/Beneficial Estate Planners²⁷; attorney William



D. Baker (Iowa);²⁸ Royce D. Hanna, a/k/a Royce Hanna & Assocs. (Kansas);²⁹ and Mid-America Living Trust (Wisconsin).³⁰

As mentioned above with regard to AASC, consumers have complained that companies have misrepresented their connection to AARP. For example, The Senior Citizens Advisory Department, American Wills & Planning Inc., addressed its solicitation piece to "Senior Citizens Home Owners; AARP members." Moreover, the solicitation urged people to return a pre-paid postcard to find out if they "qualify" for a living trust. Another company was charged with misrepresenting to consumers that creditors cannot

make a claim against assets placed in a living trust, that people who place their assets in a living trust would not need to spend their assets if they enter a nursing home, and that no death taxes need to be paid if a living trust is purchased.³¹

Costs — Living Trusts vs. Wills

Sales representatives also frequently exaggerate the costs associated with wills and the probate process, leading potential customers to believe that living trusts are a much more economical choice. In general, an attorney will charge several hundred dollars more to draft a living trust than to draw up a will. A more accurate comparison, however, should include all the costs associated with a living trust versus those associated with drafting a will plus probate.

Depending on the state, a living trust may, in fact, be less expensive than a will plus probate. However,

²⁵ *Id.* at 9-10.

²⁶ *Id.* at 10-11.

²⁷ See *Iowa v. Robert Christensen & Daniel Johnson, individually and d/b/a Beneficial Living Trust*, No. 28723 (filed Iowa Dist. Ct. Apr. 6, 1992).

²⁸ *The Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Baker*, 492 N.W.2d 695 (Iowa Sup. Ct. 1992).

²⁹ *Kansas v. Royce D. Hanna, d/b/a Royce Hanna & Assocs.*, No. 92-CV-12 (Kan. Dist. Ct. complaint & motion for preliminary injunction filed May 1, 1992).

³⁰ See *Wisconsin v. Mid-America Living Trust, Inc.*, No. 91CV730 (Wis. Cir. Ct. Walworth County; complaint filed Dec. 2, 1991).

³¹ *Id.*

the boilerplate trusts being marketed by many unscrupulous companies cost much more than living trusts drawn up by an attorney according to an individual's specific needs. Moreover, the cost quoted for the trust is for the document itself, and does not include costs associated with transferring property into the trust or managing trust property. AARP, in the booklet "Living Trusts and Wills" (see footnote 4), compiled average comparative costs for living trusts in San Diego, CA; Milwaukee, WI; and Wilmington, DE. The results (see BOX, below), show that an individual with a modest estate generally would save more than \$1,000 by having an attorney draft a living trust as opposed to a will plus probate; a couple would save slightly less. Moreover, even the most expensive living trust figure illustrated — \$1,850 for a Wilmington couple (who in some cases might spend as little as \$250 for a trust drafted by a reputable attorney) — is significantly less

than the "assembly-line" trusts currently being marketed for as much as \$3,000, plus a common monthly "maintenance fee"!

Fighting Back Against Peddlers of Misleading Living Trusts

Due to the high number of complaints, and the actual and potential injury to older Americans, numerous state Attorneys General have focused their attention on the problems posed by living trust scams. To coordinate their efforts, consumer protection advocates from at least 25 states, in attendance at the Spring 1992 National Association of Attorneys General Consumer Protection Seminar, formed an informal Living Trust Task Force. Task force members exchange documents and participate in conference calls to develop strategies and to share information about specific scams and experiences trying to stop them. The task force works with AARP's Con-

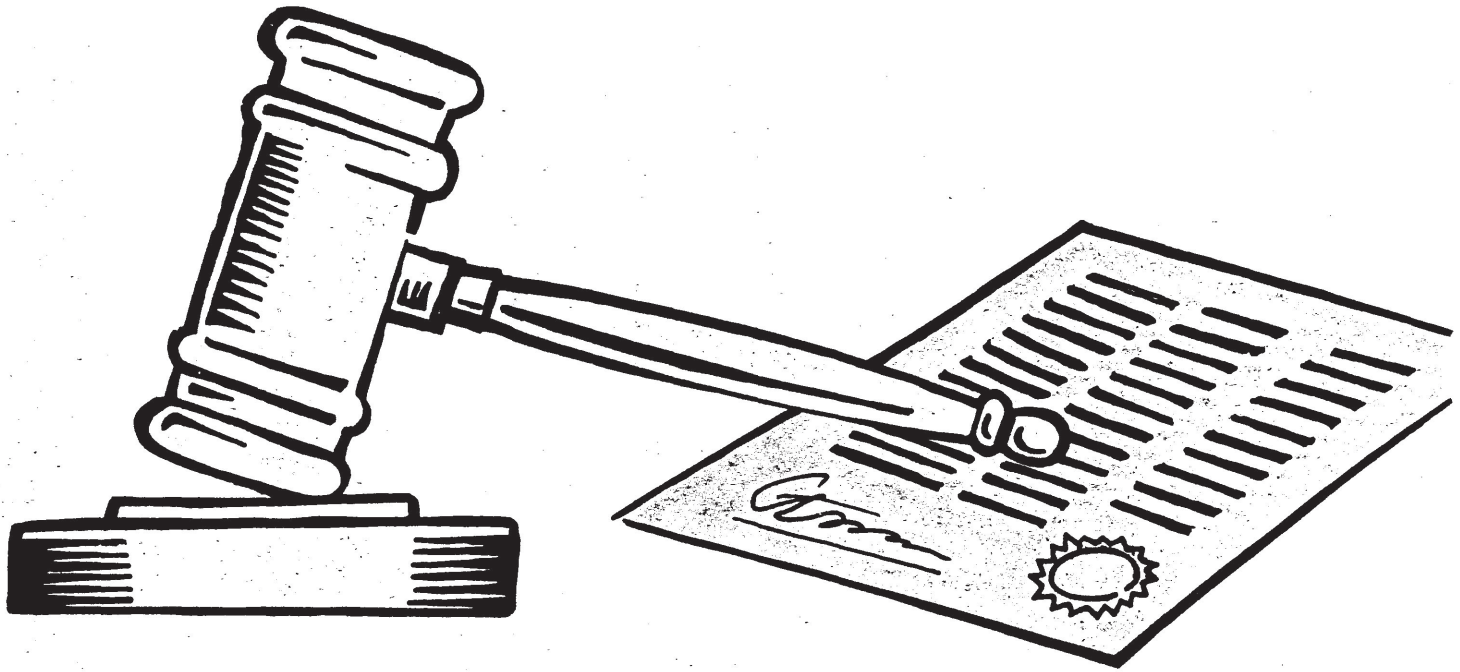
sumer Affairs Section and the American Bar Association's Commission on Legal Problems of the Elderly, to allow the widest possible dissemination of consumer education materials. In addition, in September 1992, several Attorneys General and AARP testified before the U.S. Senate Special Committee on Aging which was looking into living trust scams and other fraud perpetrated against older persons. AARP urged that a comprehensive national enforcement campaign be undertaken, to operate in cooperation with state consumer protection officials.

Suits against companies and individuals selling living trusts have been brought on several different bases. These include: actions under state Uniform Deceptive Acts and Practices (UDAP) laws; fraud or misrepresentation actions; and violations of door-to-door sales statutes (based on the failure to inform customers that they have three days to cancel the contract). State bar associations have also brought actions, alleging that the marketing and sale of living trusts by corporations and non-attorneys constitutes the unauthorized practice of law.

Several legal actions already have borne fruit. As mentioned earlier, AASC has ceased operation. According to the New York Attorney General's office, a multistate task force of 21 Attorneys General is currently investigating Prepaid Legal Services, Inc., the company that AASC used to draft trust documents. The task force is trying to get refunds for AASC customers.

In Iowa, the Attorney General's office and the Commission on the Unlicensed Practice of Law brought related actions against Beneficial Living Trust and Beneficial Estate Planners. A consent injunction was entered against Beneficial in both cases and, according to the Attorney General's Office, the state was able

Price Range of Will and Probate for 77-Year-Old with \$80,000			
	San Diego	Milwaukee	Wilmington, DE
Low	\$ 1848	\$ 1580	\$ 1428
Average	1971	1654	1501
High	2298	1805	1758
Cost of Living Trust for 72-Year-Old with \$80,000			
	San Diego	Milwaukee	Wilmington, DE
Low	\$ 300	\$ 300	\$ 150
Average	598	540	350
High	850	1000	600
Price Range of Living Trust for Couple with \$150,000 Home and \$50,000 in Stocks			
	San Diego	Milwaukee	Wilmington, DE
Low	\$ 495	\$ 350	\$ 250
Average	956	795	565
High	1600	1500	1850



to obtain restitution for all the people who had been harmed by the company's actions.³²

In October 1992, the Attorney General of Washington filed an assurance in county court in which The Estate Plan of California and its president agreed not to use deceptive tactics in marketing and selling living trusts to Washington consumers.³³ The court order stemmed from an investigation into allegations that the firm's representatives engaged in the unauthorized practice of law and made misrepresentations about Washington's probate system. The company admitted no wrongdoing by signing the assurance, but agreed to arrange for consumers to confer with an attorney licensed to practice in Washington if they are seriously considering buying a living trust from the company. The company also agreed to tailor its sales presentation to accurately reflect Washington's probate system, and paid the state \$14,500 to offset its investigation costs.

³² See note 27, *supra*; injunction entered by consent order May 6, 1992.

³³ *In re The Estate Plan*, No. 92 2 101594 (assurance filed Oct. 15, 1992, Wash. Super. Ct. Pierce County).

Other states also have brought successful actions against companies and individuals that sell living trusts. For example, Kansas obtained a consent judgment³⁴ based on allegations that a sole proprietor did not have the authority to provide the advice and service he gave in connection with the solicitation and sale of living trusts; that the individual knew or had reason to know that the price for the living trust package he sold was far in excess of the price at which similar services were readily available; and that the packages sold were not personalized for clients. A Kansas district court enjoined the defendant from engaging in the unauthorized practice of law, i.e., of "conferring with consumers regarding matters requiring the knowledge and application of legal principles and techniques," and from preparing documents that confer legal rights. The defendant agreed to cease engaging in all the allegedly deceptive and unconscionable acts, and to pay \$1,000 in investigation fees to the

³⁴ *Kansas v. Royce D. Hanna, d/b/a Royce Hanna & Assocs.*, No. 92-CV-12 (Kan. Dist. Ct. Aug. 31, 1992).

Attorney General, \$27,500 in civil penalties to the state, and specified amounts on behalf of consumers according to their actual damages. According to the Attorney General's Office, the defendant disappeared after the judgment was entered, and the litigation division of the Attorney General's office is pursuing the collection aspect of the matter.

In Wisconsin, the state Department of Justice obtained and collected a \$7,400 civil judgment against Mid-America Living Trust and its president, Robert Dillie.³⁵ The state also got an injunction to prevent Mid-America from making misrepresentations in connection with its sale of living trusts. Specifically, the court enjoined the defendants from making the following false statements: creditors cannot make claims against assets placed in such a trust; customers would not have to spend their assets if they had to enter a nursing home; and customers would not have to pay death taxes. The court also enjoined the defendants from failing to provide Wisconsin

³⁵ *Wisconsin v. Mid-America Living Trust, Inc.*, No. 91CV730 (Wis. Cir. Ct. May 27, 1992).

consumers with two copies of a notice of their right to cancel the transaction in accordance with state law.

At least three states have directly addressed whether the sale and preparation of living trust documents by non-attorneys constitutes the unauthorized practice of law. The Florida Supreme Court issued a three-part ruling concerning what does and does not constitute the practice of law.³⁶ First, assembling, drafting and executing a living trust document, and funding the trust, constitute the practice of law. Also, a lawyer must determine the client's need for a living trust and must identify the type of living trust most appropriate for the particular client. Second, merely collecting the information necessary for the living trust does not constitute the practice of law, and nonlawyers thus may properly perform this activity. Third, the court stated that "[i]f the lawyer is employed by the corporation selling the living

trust rather than by the client, then the lawyer's duty of loyalty to the client could be compromised." Thus, the lawyer who "assembles, reviews, executes, and funds a living trust document should be an independent counsel paid by the client and representing the client's interests alone." According to a representative of the Florida Bar, there currently is an investigation into complaints that the American Senior Citizens Alliance is engaged in the unlicensed practice of law with regard to the sale of living trusts.

In Iowa, the Supreme Court reprimanded an attorney who had accepted referrals from a certified financial planner and a bank trust officer for the purpose of preparing living trusts.³⁷ The financial planner, not the attorney, approved the use of particular "legal instruments by which legal rights of others are either obtained, secured or transferred," and thus exercised the professional judgment that constituted the practice of

law. The attorney aided the financial planner's unauthorized practice of law by allowing the financial planner to exercise the professional judgment that the lawyer should have exercised, by allowing the financial planner to act in a confidential capacity with clients who later were referred to the lawyer, and by accepting approximately 100 referrals from the financial planner.³⁸ The court also found that the lawyer had a conflict of interest, by allowing the financial planner to influence his professional judgment in providing legal services to referred clients. The financial planner, not the lawyer, decided on the appropriateness of a living trust and the particular documents necessary to effectuate it, and the attorney allowed the financial planner to "direct or regulate his professional judgment," as well as to "dilute [his] loyalty to his client[s]."

Finally, on August 11, 1993, the Governor of Illinois signed Public Law 88-305 which amends the Consumer Fraud and Deceptive Business Practices Act by making the "assembly, drafting, execution, and funding of a living trust by a corporation or a nonlawyer . . . an unlawful practice." The law goes into effect on January 1, 1994, making first offenses punishable as a misdemeanor, with subsequent offenses punishable as a felony.

How to Avoid Being Taken

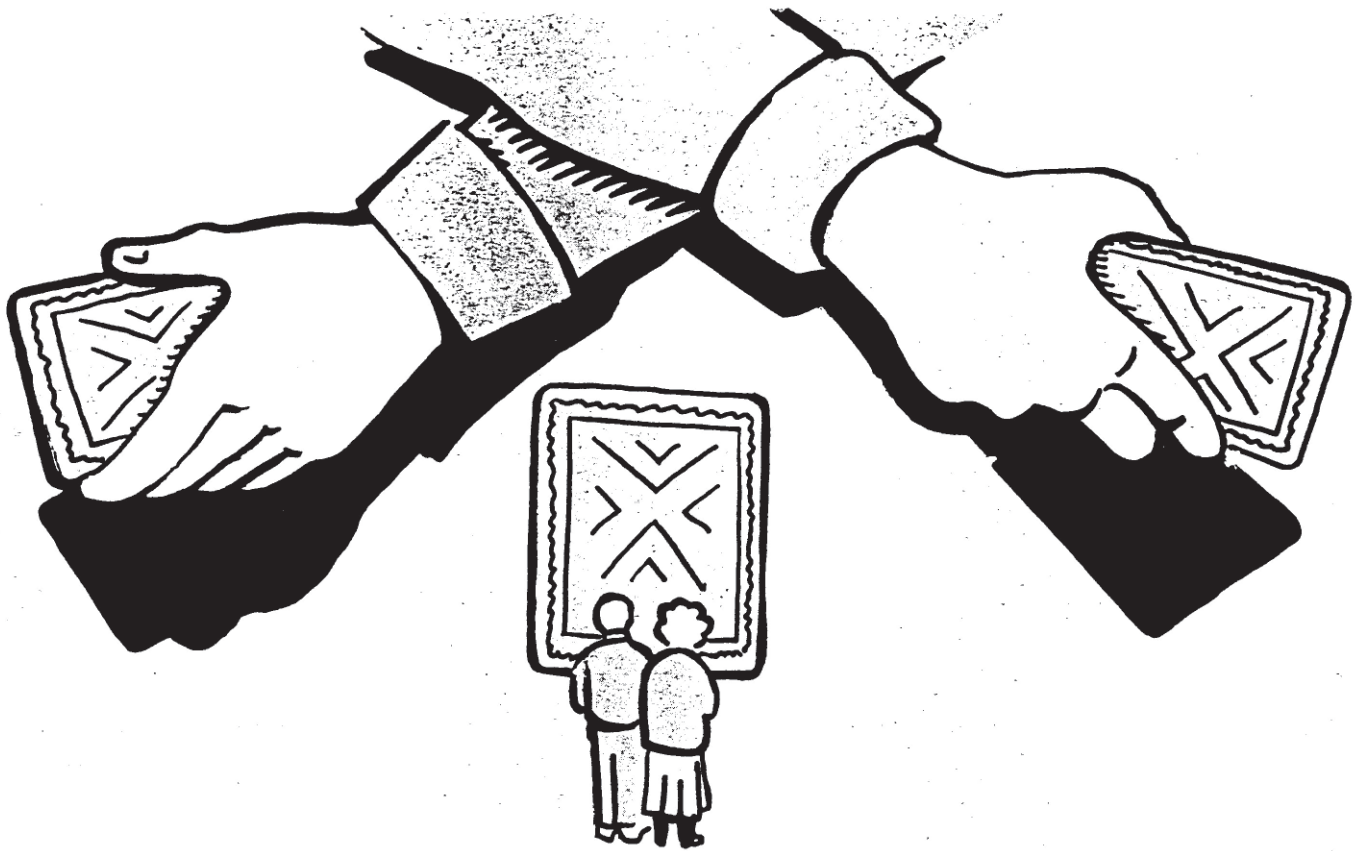
As in many other situations, it appears that the best way to protect against a living trust scam is to become informed about the product and its proponents. A revocable living trust may be an excellent estate planning tool for a

³⁶ *The Florida Bar re Advisory Opinion — Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. Sup. Ct. 1992).

³⁷ *The Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Baker*, 492 N.W.2d 695 (Iowa Sup. Ct. 1992).

³⁸ The court notes that living trusts "may be a very poor substitute for probate. Unlike probate fees, the fees charged by nonlawyers like [the financial planner] who tout living trusts are not subject to court scrutiny. Lack of court scrutiny can easily lead to unnecessary and excessive fees."





particular older American. But, even where this is true, there are many alternatives to the high-priced, high-pressure companies described in this newsletter. Before committing any time or money, or giving any signed documents to someone actively selling living trusts or "prepaid legal services," individuals should carefully review the amount and type of their assets, as well as their wishes regarding the distribution of these assets after death. They also should be able to answer the following questions:

- What is the *real* cost of a local attorney drafting a will or living trust?
- What is the *real* cost of probating a will in their state?³⁹
- How much will it cost to transfer the title to property into a living trust? Who will handle future transfers?
- Does the person selling services

claim to have a connection with AARP? If so, the company should be avoided and reported immediately to AARP Consumer Affairs, and the local consumer protection agency or Attorney General's office.

- Will an independent attorney who is licensed to practice law in the customer's state and who has experience in estate planning actually advise the customer on the appropriateness of a living trust in his or her circumstances, counsel on its contents, and draft and execute the necessary documents?
- Is the sales representative trying to sell a "package" or "kit" of services? In other words, will the documents be individualized according to the consumer's assets, planning needs, etc.? Estate planning is a highly individualized and legally complicated procedure, and no "package" or "kit" filled out after a single interview with a sales representative can provide satisfactory documents. In fact, the form documents sold by an out-of-state company may not even satisfy

the state's legal requirements for a valid trust document.

- Does the company charge fees beyond the cost of drafting the trust documents? Consumers should be suspicious if there is a monthly "maintenance" fee for updated information or related services.
- Does the sales representative insist on receiving detailed and confidential information about the customer's finances and/or personal life (e.g., bank account numbers and balances; value of life insurance, annuities, pensions)? Customers should be extremely wary about providing this type of information.
- Have other people filed complaints against this company? Anyone considering purchasing a living trust product should check with the local and state consumer protection offices and the Better Business Bureau *before* making any commitment. Consumers should be highly suspicious of any offer that is good "only today."

³⁹ Probate costs and attorneys' fees vary from state to state. The AARP *Product Report*, "Living Trusts and Wills" (Dec. 1991), explains these costs and provides several sample comparisons of estimated will/probate versus living trust costs. Also see the examples in the BOX above.

Be an Informed Consumer: Learn the Facts About Living Trusts

A living trust can be an extremely useful estate planning tool, but sweeping claims about what it absolutely will and will not accomplish in every situation need to be viewed with caution.

- A living trust can, but will not always, avoid probate.
- Once a will is submitted for probate, it becomes a matter of public record, while a living trust generally allows people to keep their affairs private. Such privacy is not guaranteed, however.
- Creditors may be able to reach assets placed in a living trust.
- Learn the cost of probate in your state; companies that sell living trust packages often exaggerate these costs.
- Find out how long it generally takes to probate a will in your state; this too is often overstated.
- Living trust sales representatives often exaggerate what an attorney will charge to draft and probate a will.
- Living trusts do not avoid inheritance, death, and income taxes.
- Make sure that a licensed, qualified attorney will prepare your trust documents; check with several such attorneys about how much they will charge for this service.
- Verify that the trust documents comply with state law.
- Make sure that your assets are transferred into the trust, and that later-acquired assets will be as well.
- For door-to-door sales, you are entitled to two copies of the notice of your right to cancel a contract within three days.

ABOUT THIS PUBLICATION . . .

Senior Consumer Alert is produced by the American Association of Retired Persons' Consumer Affairs Section (Program Coordination and Development Department) and the National Association of Attorneys General's Elderly and Consumer Law Subcommittee (Chairman, Robert Butterworth, Attorney General, Florida) in response to patterns of fraud or abuse detected nationwide affecting the older consumer.

To alert AARP/NAAG about subjects for future issues, please contact:

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EXHIBIT 89
DATE 3/5/97
SB 79

Proposed Amendments
S.B. 79
Third Reading Copy
February 21, 1997

1. Page 2, line 15.

Strike: "OR"

2. Page 2, line 17.

Strike: "."

Insert: "; or"

3. Page 2.

Following: line 17

Insert: "(c) a person on behalf of an educational, charitable,
or religious institution when done in conjunction with an
attorney licensed to practice law in this state."

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN BOB CLARK, on March 10, 1997,
at 8:00 AM, in Room 312-1.

ROLL CALL

Members Present:

Rep. Bob Clark, Chairman (R)
Rep. Daniel W. McGee, Vice Chairman (Majority) (R)
Rep. Chris Ahner (R)
Rep. Shiell W. Anderson (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Duane Grimes (R)
Rep. H.S. "Sonny" Hanson (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Brad Molnar (R)
Rep. Gerald Pease (D)
Rep. Diane Sands (D)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)

Members Excused: Rep. Diana E. Wyatt, Vice Chairman (Minority)

Members Absent: Rep. Liz Smith (R)

Staff Present: John MacMaster, Legislative Services Division
Joanne Gunderson, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 138, SB 141, SB 142, SB 145
POSTED 2/24/97
Executive Action: SB 138 BE CONCURRED IN
SB 141 BE CONCURRED IN
SB 142 BE CONCURRED IN
SB 145 BE CONCURRED IN
SB 79 BE CONCURRED IN AS
AMENDED

HEARING ON SB 145

Opening Statement by Sponsor: SEN. AL BISHOP

{Tape: 1; Side: A; Approx. Time Count: 1.6; Comments: This set of minutes is recorded on 90-minute tapes.}

Proponents' Testimony:

BETH BAKER, Department of Justice

{Tape: 1; Side: A; Approx. Time Count: 10.3}

Questions From Committee Members and Responses:

{Tape: 1; Side: A; Approx. Time Count: 13.0 - 28.5}

Closing by Sponsor: SEN. BISHOP

{Tape: 1; Side: A; Approx. Time Count: 28.6}

HEARING ON SB 141

Opening Statement by Sponsor: SEN. KEN MESAROS

{Tape: 1; Side: A; Approx. Time Count: 29.6}

Proponents' Testimony:

PATRICK GRAHAM, Department of Fish, Wildlife and Parks EXHIBIT 1

{Tape: 1; Side: A; Approx. Time Count: 34.3}

BETH BAKER, Department of Justice

{Tape: 1; Side: A; Approx. Time Count: 37.6}

Questions From Committee Members and Responses:

{Tape: 1; Side: B; Approx. Time Count: 0.1}

Closing by Sponsor: SEN. MESAROS

{Tape: 1; Side: B; Approx. Time Count: 6.3}

HEARING ON SB 142

Opening Statement by Sponsor: SEN. REINY JABS

{Tape: 1; Side: B; Approx. Time Count: 7.4}

Questions From Committee Members and Responses:

{Tape: 1; Side: B; Approx. Time Count: 9.7 - 13.2}

Closing by Sponsor: SEN. JABS

{Tape: 1; Side: B; Approx. Time Count: 13.3}

HEARING ON SB 138

Opening Statement by Sponsor: SEN. MIKE FOSTER

{Tape: 1; Side: B; Approx. Time Count: 13.9}

Opponents' Testimony:

CHRISTOPHER MILLER, Powell County Attorney
{Tape: 1; Side: B; Approx. Time Count: 17.0}

MIKE McGRATH, Lewis and Clark County Attorney
{Tape: 1; Side: B; Approx. Time Count: 21.9; Comments: Also
representing County Attorney Association.}

Informational Testimony :

BETH BAKER, Department of Justice
{Tape: 1; Side: B; Approx. Time Count: 22.6}

EXHIBIT 2

Proponents' Testimony:

GORDON MORRIS, Montana Association of Counties
{Tape: 1; Side: B; Approx. Time Count: 25.5; Comments: This
proponent appeared late and was allowed without objection to
testify as a proponent though that portion of the hearing had
closed.}

Questions From Committee Members and Responses:

{Tape: 1; Side: B; Approx. Time Count: 26.3-Tape 2; Side A; 11.9}

Closing by Sponsor: SEN. FOSTER

{Tape: 2; Side: A; Approx. Time Count: 22.0}

EXECUTIVE ACTION ON SB 138

Motion: REP. SANDS moved SB 138 BE CONCURRED IN.

{Tape: 2; Side: A; Approx. Time Count: 25.6}

Discussion:

{Tape: 2; Side: A; Approx. Time Count: 25.8 - 30.9}

Vote: The motion carried 15 - 2; REPS. AHNER and CLARK voting
no. REPS. WYATT and GRIMES voted aye by proxy. REP. GRIMES will
carry SB 138.

EXECUTIVE ACTION ON SB 145

Motion: REP. BOHARSKI moved SB 145 BE CONCURRED IN.

{Tape: 2; Side: A; Approx. Time Count: 31.2}

Discussion:

{Tape: 2; Side: A; Approx. Time Count: 31.5-35.5; Comments: John
MacMaster explained the bill.}

Motion/Vote: REP. MC GEE moved to amend SB 145. The motion
failed 3 - 14. REPS. MC GEE, CURTISS and CLARK voting aye.

{Tape: 2; Side: A; Approx. Time Count: 38.1}

Vote: The motion to concur in SB 145 carried 15 - 1. REP. MC GEE voting no. REPS. TASH, WYATT and KOTTEL voted aye by proxy. REP. TASH will carry SB 145.

EXECUTIVE ACTION ON SB 141

Motion: REP. BOHARSKI moved SB 141 BE CONCURRED IN.
{Tape: 2; Side: A; Approx. Time Count: 40.3}

Discussion:
{Tape: 2; Side: A; Approx. Time Count: 42.1-Tape 2; Side B; 1.8}

Vote: The motion carried 15 - 2; REPS. HURDLE and CURTISS voting no. REPS. HANSON, TASH, KOTTEL and WYATT voted aye by proxy. REP. REHBEIN will carry SB 141.

EXECUTIVE ACTION ON SB 142

Motion: REP. BOHARSKI moved SB 142 BE CONCURRED IN.
{Tape: 2; Side: B; Approx. Time Count: 1.9}

Discussion:
{Tape: 2; Side: B; Approx. Time Count: 2.4}

Vote: The motion carried 16 - 0. REPS. WYATT, KOTTEL and TASH voted aye by proxy. REP. PEASE will carry SB 142.

EXECUTIVE ACTION ON SB 79

Motion: REP. ELLINGSON moved SB 79 BE CONCURRED IN.
{Tape: 2; Side: B; Approx. Time Count: 5.8}

Motion: REP. SOFT moved to amend SB 79
{Tape: 2; Side: B; Approx. Time Count: 6.3}

EXHIBIT 3

Discussion:
{Tape: 2; Side: B; Approx. Time Count: 7.6 - 15.0}

Vote: The motion carried 16 - 1; REP. MOLNAR voting no. REPS. WYATT, KOTTEL and TASH voted aye by proxy.

Motion: REP. ELLINGSON moved SB 79 BE CONCURRED IN AS AMENDED.
{Tape: 2; Side: B; Approx. Time Count: 15.4}

Discussion:
{Tape: 2; Side: B; Approx. Time Count: 15.5}

Motion/Vote: REP. ANDERSON moved an amendment to provide a sunset clause and require a report to the next session to re-authorize the provision. The motion carried unanimously.
{Tape: 2; Side: B; Approx. Time Count: 24.5}

Motion/Vote: REP. SANDS moved SB 79 BE CONCURRED IN AS AMENDED.
The motion carried 14 - 3; REPS. MOLNAR, BOHARSKI and CLARK
voting no. REPS. TASH, KOTTEL and WYATT voted aye by proxy.
{Tape: 2; Side: B; Approx. Time Count: 27.5}

EXECUTIVE ACTION ON SB 31

Motion: REP. BOHARSKI moved SB 31 BE CONCURRED IN.
{Tape: 2; Side: B; Approx. Time Count: 30.0}

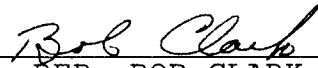
Discussion:

{Tape: 2; Side: B; Approx. Time Count: 31.5-Tape 3; Side A; 3.8;
Comments: REP. BOHARSKI withdrew the motion. The chairman ruled
that action would be postponed. See exhibit 4.} EXHIBIT 4

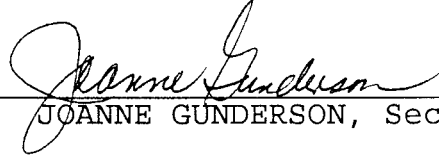
MOTION/VOTE: REP. MC GEE MOVED TO ADJOURN. The motion carried
by unanimous voice vote.

ADJOURNMENT

Adjournment: The meeting was adjourned at 11 AM.



REP. BOB CLARK, Chairman



JOANNE GUNDERSON, Secretary

BC/jg

EXHIBIT 3
DATE 3/10/97
SB 79

Proposed Amendments
S.B. 79
Third Reading Copy
February 21, 1997

1. Page 2, line 15.

Strike: "OR"

2. Page 2, line 17.

Strike: "."

Insert: "; or"

3. Page 2.

Following: line 17

Insert: "(c) a person on behalf of an educational, charitable,
or religious institution when done in conjunction with an
attorney licensed to practice law in this state."